IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1175

HATZLACHH SUPPLY COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

TABLE OF AUTHORITIES

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OPINION BELOW

The opinion of the Court of Claims (App. A, pp. 1a-8a, *infra*) is reported at 579 F.2d 617.

JURISDICTION

The opinion and judgment of the Court of Claims were entered on July 14, 1978. On September 29, 1978, the Court of Claims denied a timely petition for rehearing (App. B, p. 9a, *infra*). On December 8, 1978, Mr. Chief Justice Burger extended petitioner's time for filing a petition for a writ of certiorari to and including January 27, 1979 (App. C, p. 10a, *infra*). Jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTION PRESENTED

Whether the United States may be held liable for breach of an implied contract of bailment when goods seized from an importer by the United States Customs Service are lost while in the temporary custody of the Customs Service.

STATUTORY PROVISIONS INVOLVED

The Tucker Act, 28 U.S.C. §1419 provides, in relevant part, as follows:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The Tort Claims Act provides in relevant part, 28 U.S.C. § 2680:

> The provisions of this chapter and section 1346(b) of this title shall not apply to —
>
> * * *
>
> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by an officer of customs or excise or any other law-enforcement officer.

STATEMENT

Petitioner imported camera supplies and other items from Germany. Upon arrival of some of these goods in New Jersey, a routine inspection showed a discrepancy between the merchandise description on the delivery application and the invoices for the goods. Taking action which the

court below described as "perhaps of questionable severity" (p. 2a, *infra*), the United States Customs Service thereupon seized the goods and declared them forfeited.

Petitioner followed the regulatory procedures to obtain relief from the seizure and forfeiture, informing Customs that it had no role in the preparation of the merchandise description on the application, which was handled by a broker. Customs agreed to return the merchandise upon payment of $40,000.

Petitioner complied with the demand made by Customs, but when the shipment was returned, merchandise valued at $165,220.50 was missing. Petitioner thereafter brought suit in the Court of Claims alleging, *inter alia*, a breach of an implied contract of bailment. The government moved for summary judgment, claiming that there was no implied contract. The Court of Claims granted the government's motion and dismissed the petition.

REASONS FOR GRANTING THE WRIT

1. The court below recognized that its decision conflicted with the decision of the Court of Appeals for the Second Circuit in *Alliance Assurance Co. v. United States*, 252 F.2d 529 (2d Cir. 1958), which is reproduced as Appendix D (pp. 11a-24a, *infra*) to this Petition. The government conceded unequivocally in the Court of Claims, in its response to the petition for rehearing, that the court's decision presented a square conflict. The opening sentences of the government's response to the petition for rehearing were:

> Defendant agrees with plaintiff's statement that this Court's decision "conflicts head on with the *Alliance* ruling of the Second Circuit." (P. Reh. Br. p. 1.) As defendant pointed out in its briefs, however, the *Alliance* decision was clearly erroneous.

This square conflict between the Court of Claims and the federal appellate court which has jurisdiction over the port of New York — the city which ranks first in the country as an import center[1] — presents a grave risk of unfair and inconsistent judgments on identical facts depending on the forum where the claim may be made. Whether an importer whose goods are lost while in the custody of Customs is able to recover against the United States should not depend on whether or not the importer can manage to bring his suit in a federal court in New York, Connecticut and Vermont.

2. The decision of the Second Circuit in the *Alliance Assurance Co.* case was correct, and the decision of the Court of Claims is wrong. In *Alliance*, goods were detained for inspection by Customs officials for determination whether they were of the value and quantity declared in the invoice. The goods passed inspection, but they disappeared before they could be returned to the importer, whose subrogee thereafter sued the United States for breach of an implied contract of bailment. The government asserted that no contract of bailment was created by Customs' control over the merchandise.

The Second Circuit determined, however, that an implied contract of bailment existed and that the district court had jurisdiction to find that the government had breached its contract and was liable for damages. Specifically, the court found that the process by which the goods were detained and held by Customs created a mutual understanding that the goods would be returned (p. 15a, *infra*):

> The obligation of the government . . . stemmed from an implied promise to redeliver the goods as soon as customs had checked them against the invoice . . . . It arises from the implied promise to return the goods to the lawful owner after the customs inspection has been completed.

[1] *See*, U.S. Department of Commerce, Highlights of U.S. Export and Import Trade, pp. 128-129 (1978).

This holding accords with numerous cases in which contracts have been implied from the general practices or powers — under statute or regulation — of a government agency in a given situation. In *C.F. Harms Co. v. Erie R. Co.*, 167 F.2d 652 (2d Cir. 1948), for example, a charterer of a barge was ordered to deliver the barge and the equipment on it to the Army at a particular pier. While it was in the custody of the Army, the barge was damaged in a storm. Although there had been no express agreement as to the responsibility of the Army to maintain or protect the barge, the Court of Appeals for the Second Circuit, in an opinion by Judge Learned Hand, found an implied contract of bailment upon which the government could be sued under the Tucker Act (167 F.2d at 564):

> [H]ere it seems to us that there was a bailment, view the evidence as one will. The Army's control was unconditional; it need ask no leave of the Railroad for anything it might do; it could move the scow whether and when it chose; discharge her, or hold her, as it pleased. This the officer in charge understood; the Railroad understood; and each knew that the other so understood; and we can find nothing lacking which is essential to a bailment.

See also, United States v. Dickinson, 331 U.S. 745 (1947); *Algonac Manufacturing Company v. United States*, 428 F.2d 1241 (Ct. Cl. 1970).

In this case, as in *Alliance*, petitioner relied upon the statutes and regulations governing Customs' handling of imported goods to demonstrate that an implied-in-fact contract of bailment existed.[2] The Court of Claims stated (p. 5a, *infra*):

[2] The sole difference between the procedures in *Alliance* and those here — a difference which the Court of Claims mentioned, but on which it did not base its decision — is that the merchandise in *Alliance*

> [T]he statutes cited by the plaintiff, along with the action of [Customs] in agreeing to return the goods upon payment of a $40,000 fine by Hatzlachh, could make a strong case for the existence of an implied-in-fact contract properly to preserve and redeliver all the goods to Hatzlachh.

The court below indicated that its basic difference with the Second Circuit was on the legal question whether the Tort Claims Act bars suit in the circumstances of these cases. The relevant provision of the Tort Claims Act (28 U.S.C. 2680(c)) exempts the United States from suit for:

> [a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

The Second Circuit in *Alliance* correctly held that the exemption in the Tort Claims Act was designed only "to prohibit actions for conversion arising from a denial by the customs authorities or other law enforcement agencies of another's immediate right of dominion or control over goods" in their possession (p. 18a, *infra*). It said that the provision was not intended to bar actions "based on the negligent destruction, injury or loss of goods in the possession or control of the customs authorities . . . ." *Ibid.*

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was simply "detained" for comparison of the merchandise and its invoices, while in this case, the merchandise was "seized" and "subject to forfeiture." *Compare* 19 U.S.C. §1499 and 19 U.S.C. §1592. Under the latter procedure, the importer may follow an administrative process to challenge the seizure and, if it prevails, the merchandise is to be "returned forthwith to the claimant." 28 U.S.C. §2465. If, as here, Customs finds that mitigating circumstances justify "remission" of the forfeiture, it may impose reasonable terms, in this case the payment of $40,000, and then return the goods. See 19 U.S.C. §1618.

This issue of statutory construction is what separates the Second Circuit from the Court of Claims in this case. The court below held that while it could "sympathize with the plaintiff for the loss of such a substantial amount of goods" (p. 7a, *infra*), it would not permit such a claim in the face of the exempting language of the Tort Claims Act. In so doing, it applied the Tort Claims Act to an action which depends not on tort, but on contract.

The court below erroneously based its holding upon *Feres v. United States*, 340 U.S. 135 (1950) and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), which held that a solider is limited to the statutorily provided damages in the Veterans' Benefits Act for injuries incurred while in the service and may not sue in tort to avoid the limitations of the Act. The court also relied upon *Jackson v. United States*, 573 F.2d 1189 (Ct. Cl. 1978), which held that no such suit could be brought for breach of contract. But these cases do not determine whether a contract action may be maintained when a contract could be implied from the conduct of the parties and Congress has enacted *no alternative statutory remedy*.[3]

Finally, the decision of the court below leads to a totally unjust result whereby government agents are permitted to assume exclusive custody over valuable property with no countervailing responsibility to account for that property. Congress surely was not intending to permit the Customs Service to deal so cavalierly with imported goods when it included this particular proviso in the Tort Claims Act. The

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[3]In fact, the Court of Claims in *Jackson* did not find that a soldier could not sue on an implied contract simply because he could not have sued under the Tort Claims Act. Rather, the Court in *Jackson* analyzed the relationship between the soldier and the government — reviewing the details of his recruitment — and determined that no contract other than his written contract with the Army existed. A similar analysis of these facts would result in a finding that there was an implied contract of bailment.

extraordinary result reached by the court below is contrary to the fundamental principles which underlie the constitutional guarantees of Due Process and Just Compensation contained in the Fifth Amendment.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the United States Court of Claims

No. 120–76

Decided July 14, 1978

HATZLACHH SUPPLY COMPANY, INC. v. THE UNITED STATES

Mark Landesman, attorney of record, for plaintiff.
George M. Beasley, III, with whom was *Assistant Attorney General Barbara Allen Babcock*, for defendant.
Richard A. Corwin, attorney of record, for noticed third-party Sea-Land Service, Inc.

Before DAVIS, KUNZIG, and BENNETT, *Judges*.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

KUNZIG, *Judge*, delivered the opinion of the court:

This action, involving plaintiff's claim that the Government breached an implied-in-fact contract which allegedly arose from the detention of certain merchandise by United States Customs Service personnel comes before the court on defendant's motion for summary judgment and plaintiff's opposition thereto. Because we essentially agree with the Government's argument concerning the clear congressional intent to retain sovereign immunity with regard to claims arising out of detentions of materials by customs inspectors, we hold that plaintiff's petition does not state a claim upon which relief can be granted and, accordingly, we grant defendant's motion.

Hatzlachh Supply Company (Hatzlachh or plaintiff) alleges that in 1970 it imported certain camera supplies and miscellaneous items from Germany which, upon arrival in port in New Jersey, were seized and declared forfeited by the United States Customs Service (USCS). Plaintiff followed statutory and regulatory procedures in seeking relief from the forfeiture. *See* 19 U.S.C. § 1618 (1970); 19 C.F.R. § 171.11-13 USCS, in October of 1970, agreed to return the forfeited materials upon payment of a $40,000 penalty. Hatzlachh complied with the terms prescribed by the USCS and paid the $40,000 into the Treasury of the United States. Upon the return of the seized material to plaintiff, it was noted that certain items were inexplicably missing. Hatzlachh brought suit in this court seeking to recover $165,220.50 (plus $2,000,000 for alleged loss of "face and good will . . .") which it alleges was the total value of the goods that were "pilfered" or "stolen" while the forefeited material was in the possession of the defendant.

Defendant now moves for summary judgment on grounds that plaintiff has failed to state a claim within the jurisdiction of this court. Plaintiff's petition set forth two separate causes of action. The first involved an alleged breach of a contract of bailment while the second alleged that the seizures were "capricious, arbitrary, unreasonable, unlawful and not sanctioned nor colored" by law and that they "constituted an unreasonable detainer of plaintiff's property and deprivation without due process."

We agree with the defendant that plaintiff's second cause of action is unsupportable. Plaintiff's own petition to the Regional Commissioner of Customs *admitted* that the merchandise description submitted to the USCS officials was "erroneous" and that the discrepancy between the merchandise description and the items actually landed were "obvious and apparent." Although plaintiff's petition goes on to question the propriety of the USCS's actions against the goods, such "obvious and apparent" deviations from prescribed USCS import procedures certainly would render the USCS's action non-arbitrary and non-capricious, although perhaps of questionable severity.

Even if we should determine that the defendant's actions were so arbitrary and capricious as to be outside the broad statutory and regulatory discretion and authority accorded the USCS, this portion of plaintiff's second cause of action would then sound in tort, and this court would be without jurisdiction. 28 U.S.C. § 1491 (Supp. V 1975); *Algonac Mfg. Co.* v. *United States*, 192 Ct.Cl. 649, 428 F.2d 1241 (1970).

The second portion of plaintiff's second cause of action is equally without merit. Defendant's declaring a forfeiture of goods under 19 U.S.C. § 1592 (1970) is hardly comparable to a "taking" for public use without just compensation, which would allow plaintiff to recover pursuant to the Fifth Amendment's ban on such taking. *See, e.g., Huerta* v. *United States*, 212 Ct.Cl. 473, 548 F.2d 343, *cert. denied*, — U.S. —, 98 S.Ct. 108 (1977). Again, plaintiff is faced with the situation where the forfeiture was either declared in accordance with statutory and regulatory guidelines, in which plaintiff *was* accorded the "due process of law" and there was no "taking," or else the action taken was outside statutory and regulatory authority, in which case this court is without jurisdiction because plaintiff's action sounds in tort.

Plaintiff's first cause of action, however, based on the Government's breach of an implied contract of bailment, presents a much more difficult and serious problem. Plaintiff contends that the USCS, in taking custody of the goods, made only a provisional seizure pending full disposition on the merits. Plaintiff further relies upon the language of 28 U.S.C. § 2465 (1970), which states:

> Upon the entry of judgment for the claimant in *any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant* . . . (emphasis supplied in plaintiff's brief)

for the proposition that the Government's allegedly provisional seizure created an implied contract of bailment between Hatzlachh and the United States. Plaintiff's logical conclusion is that, in failing properly to protect and return some of the material seized, defendant breached this implied contract of bailment.

Plaintiff's argument gains considerable support from the decision of the Second Circuit in *Alliance Assurance Company* v. *United States*, 252 F.2d 529 (2d Cir. 1958). In that case involving similar circumstances, the court, in a two-part holding, determined that an implied-in-fact contract did exist[1] between the USCS and the importer and that the importer had an alternate cause of action under the Federal Tort Claims Act. The Federal Tort Claims Act assumes significance in *Alliance*, as it does in the case at hand, for two reasons. One is the resemblance which the importer's claim of a breach of contract bears to a claim for a breach of duty in tort. The other reason is that such claims in tort are explicitly barred by 28 U.S.C. § 2680(c) (1970), which excepts from the coverage of the Tort Claims Act:

> Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs . . . .

The *Alliance* court, interestingly, found that the § 2680(c) exclusion did not apply because the merchandise in question had disappeared and goods which had disappeared could not have been subject to "detention" within the meaning of the statute. Even more to the point, however, the court in *Alliance* reasoned that the Government had, by exerting its statutory authority over the goods, implied a promise to return the goods to the importer. Thus, the court determined that plaintiff in *Alliance* had causes of action under both the Tucker Act, 28 U.S.C. § 1491 (Supp. V 1975) and the Tort Claims Act.

The defendant argues that Alliance was *wrongly* decided and is, in any event, distinguishable from the case at hand. It contends that the *Alliance* court, in reversing its own district court, incorrectly utilized the "loose, umbrella concepts of bailment law" to broaden drastically the Tucker Act's limited waiver of sovereign immunity. The Government further points out for support this court's

[1] Since the claim in *Alliance* was for an amount less than $10,000, the Federal District Court had concurrent jurisdiction with the Court of Claims. 28 U.S.C. § 1346(a)(2) (1970).

"venerable precedent" in *Schmalz* v. *United States*, 4 Ct.Cl. 142 (1868), where we held that the general law requiring customs inspection did not imply a contract with the Government.[2] Finally, defendant cites the rationale of the district court judge in *Alliance* in arguing that no implied-in-fact contract could exist because there was no mutual assent.

Even if the *Alliance* decision were correct, continues the Government, that case was distinguishable from the one at hand. In *Alliance*, the court was faced with a situation where the goods which subsequently disappeared had merely been detained for inspection pursuant to 19 U.S.C. § 1499, while, in our present case, the goods had actually been seized subject to forfeiture pursuant to 19 U.S.C. § 1592 (1970), because a violation of the customs laws had already been found. The defendant concludes that, since goods seized subject to forfeiture (under § 1592) can be returned only after some judicial discretionary or administrative determination has been made, no implied-in-fact contract could possibly have arisen out of the seizure.

The Government's final contention centers on the important public policy involved in allowing customs officials to go about their work unimpeded by fear of "implied in fact" contract claims each time they must seize or detain some item and on the related theory that waivers of sovereign immunity must be strictly construed. We reach the same result as does the defendant, although for the somewhat different reasons stated below.

Initially, it must be noted that the statutes cited by the plaintiff, along with the action of the USCS in agreeing to return the seized goods upon payment of a $40,000 fine by Hatzlachh, could make a strong case for the existence of an implied-in-fact contract properly to preserve and redeliver all the goods to Hatzlachh. All other things being equal,

[2] Defendant also notes that *Alliance* stands alone in holding the § 2680(c) Tort Claims Act exclusion inapplicable under similar circumstances, citing *United States* v. *1500 Cases*, 249 F.2d 382 (7th Cir. 1957); *S. Schonfeld Co., Inc.* v. *S.S. Akra Tenaron*, 363 F.Supp. 1220 (D.S.C. 1973); *Bambulas* v. *United States*, 323 F.Supp. 1271 (D.S.D. 1971).

such a factual and legal combination might enable plaintiff to prevail.

However, we need not now decide this issue because, unfortunately for plaintiff, all other things in the present case are not equal. This court has previously held that there can exist no contract implied-in-fact unless there is an actual meeting of the minds and a mutual intent to be bound. *See, e.g., Somali Development Bank* v. *United States*, 205 Ct.Cl. 741, 751, 508 F.2d 817, 822 (1974). Plaintiff here would have us *imply* a promise, or intent to be bound, on the part of the Government similar to the promise implied by the Second Circuit in *Alliance:*

> It is at least as reasonable to imply such a promise here as it is to imply a promise by the government to pay for lands it has tortiously appropriated as was done in *United States* v. *Dickinson*, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (alternative holding), and *United States* v. *Lynah*, 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539.

There are, however, two major obstacles to adopting the rationale of *Alliance*. The first is the obvious factual distinction between the Government's tortious (or non-tortious) seizure of land from the unquestioned, rightful owner [as in *Dickinson*] and the USCS' seizure subject to forfeiture of goods entering the country illegally [as in our present case]. In our view, finding an implied promise to pay in the former set of circumstances certainly would not necessitate finding a similar promise to pay (or return the goods) in the latter.

An even more significant obstacle, however, is encountered in Congress' specific and explicit rejection of any tort liability for "[a]ny claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs." 28 U.S.C. 2680(c). With this strong, all-inclusive language, the legislative branch of our Government affirmatively recognized the vital importance to the public of unimpeded lawful operations by customs officers and refused to waive sovereign immunity with respect to those functions specified. Notwithstanding the possible interpretation which the *Alliance* court might give to the facts now before us, it appears clear to us that Hatzlachh's claim

obviously arose "in respect of . . . the detention of . . . goods or merchandise by [an] . . . officer of customs . . . ."

In a recent decision, this court refused to find an implied-in-fact contract in a situation where Congress had, according to the Supreme Court's interpretation of the Tort Claims Act in *Feres* v. *United States*, 340 U.S. 135 (1950), restricted a serviceman's recovery for injuries—even those tortiously inflicted—to certain statutorily prescribed procedural and substantive limitations. *Jackson* v. *United States*, 216 Ct. Cl.__, 573 F.2d 1189 (1978). In *Jackson* we cited the Supreme Court's recent decision in *Stencel Aero Eng'r Corp.* v. *United States*, 431 U.S. 666 (1977), which noted that allowing recovery on an implied-in-fact contract would be to "judicially admit at the back door that which has been legislatively turned away at the front door." 431 U.S. at 673. We concluded that "Since a soldier cannot circumvent the compensation system by suing in tort for additional money damages for injuries, there is no logical reason to allow him to circumvent the congressionally mandated limitations in a suit that he characterizes as one for breach of contract, which is the case here." *Jackson, supra*, 216 Ct. Cl. at __, 573 F.2d at 1199.

The exact rationale we employed in *Jackson* gains added strength in the case at hand. Here, Congress has *specifically precluded recovery* in claims arising from customs detentions, even where such claims arose from tortious actions by the Government. This being the fact, it would certainly be a trespass on congressional prerogatives for this court now to hold that, by seizing subject to forfeiture certain merchandise, the Government *assented* to, or agreed to be bound by, an implied-in-fact contract to return the merchandise whole. Lacking such assent by one of the parties (and here it is doubtful whether either of the parties actually agreed), we cannot find an implied-in-fact contract. *See, e.g., Somali Development Bank* v. *United States*, 205 Ct.Cl. 741, 508 F.2d 817 (1974). While we may sympathize with the plaintiff for the loss of such a substantial amount of goods, we cannot judicially allow by the back door a claim which was, rather clearly and explicitly, legislatively barred at the front.

But we do not consider the present decision as necessarily controlling a case in which there were additional facts from which an implied or express agreement could possibly arise, e.g. a promise, representation or statement that the goods would be guarded or carefully handled. It is conceivable to us that, in such circumstances, a claim might lie under the Tucker Act even though 28 U.S.C. § 2680(c) might still preclude recovery under the Tort Claims Act.

For the above-stated reasons, after reading all of the submissions in the light most favorable to the plaintiff for purposes of plaintiff's opposition to this motion for summary judgment, we hold that Hatzlachh has failed to state a claim based on an implied-in-fact contract[3] and has, therefore, failed to state a claim for which we can grant relief.

Accordingly, after consideration of all the submissions of the parties, and without oral argument, defendant's motion for summary judgment is granted, and plaintiff's petition is dismissed.

[3] Plaintiff's other contentions, as outlined and discussed above, we hold to be equally without merit.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS
No. 120-76

HATZLACHH SUPPLY CO., INC.

v.

THE UNITED STATES

Before DAVIS, *Judge*, Presiding, KUNZIG and BENNETT, *Judges*.

ORDER

This case comes before the court on plaintiff's motion, filed August 2, 1978, for rehearing *en banc* pursuant to Rules 7(d) and 151(b) with reference to the decision entered herein on July 14, 1978, which dismissed plaintiff's petition. Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that plaintiff's said motion for rehearing be and the same is denied.

/s/ Oscar H. Davis
Oscar H. Davis
Judge, Presiding

[Filed Sep. 29, 1978]

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-530

HATZLACHH SUPPLY CO., INC.,
Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE
PETITION FOR WRIT
OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 27, 1979.

/s/ Warren E. Burger
Chief Justice of the United States.

Dated this 6th
day of December, 1978

APPENDIX D

ALLIANCE ASSURANCE COMPANY,
Ltd., Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee.
No. 110, Docket 24521.

United States Court of Appeals
Second Circuit.

Argued Dec. 5, 1957.

Decided Feb. 10, 1958.

Insurer and subrogee of owner of imported goods, which mysteriously disappeared from official government warehouse, to which goods had been removed for inspection by customs officials, brought action against the United States under the Tucker Act for breach of implied contract of bailment, and under the Federal Tort Claims Act for negligent loss of the goods. The United States District Court for the Southern District of New York, Richard H. Levet, J., 146 F.Supp. 118, entered judgment for the United States, and the insurer and subrogee appealed. The Court of Appeals, Moore, Circuit Judge, held that there was an "implied contract" on the part of the United States to use due care during term of bailment, within meaning of the Tucker Act, and that there was no "detention" of the goods within the meaning of provision of the Federal Tort Claims Act that the Act does not apply to cases arising under "detention" of goods by customs officials.

Judgment reversed and cause remanded with instructions to enter judgment for the insurer and subrogee.

* * *

James H. Simonson, New York City (Bigham, Englar, Jones & Houston, New York City, on the brief), for plaintiff-appellant, Alliance Assur. Co., Limited.

Foster Bam, Asst. U.S. Atty., Southern District of New York, New York City (Paul W. Williams, U.S. Atty., for Southern District of New York, Benjamin T. Richards, Jr., Asst. U.S. Atty., Southern District of New York, New York City, on the brief), for defendant-appellee, United States of America.

Before CLARK, Chief Judge, MOORE, Circuit Judge, and SMITH, District Judge.

MOORE, Circuit Judge.

This is a suit brought against the United States by Alliance Assurance Company, Ltd., the insurer and subrogee of Carlyle Clothes, Inc., to recover the value of goods, consigned to H. W. Robinson & Co., Inc., customs broker for Carlyle and the importer of record, which, while being inspected for entry into this country, disappeared from the possession of the United States Customs.

Two causes of action were alleged: (1) under the Tucker Act, 28 U.S.C.A. § 1346 (a)(2), for breach of an implied contract of bailment; and (2) under the Federal Tort Claims Act, 28 U.S.C.A. § 1346(b), for the negligent loss of the goods.

The Facts

In the cargo discharged from the S.S. Queen Mary at Pier 90, North River, New York, N.Y., in late December 1952 was a case of English woolens weighing 309 pounds imported by the H.W. Robinson & Co., Inc., a licensed customs broker for consignment to Carlyle Clothes. The stipulated value of the goods was $2,460.59. The appropriate entry procedure was followed and $705.25 duty was paid. The Invoice Division at the Custom House

prepared ten so-called "Elliott Fisher" tickets containing identifying information, five of which were forwarded to the Appraiser at Public Stores and five delivered to the importer. Pursuant to statutory requirements (19 U.S.C.A. § 1499), on January 13, 1953 the goods were removed to Public Stores, 201 Varick Street, New York, N.Y. (the official government warehouse), for inspection by the customs officials to ascertain if the goods were of the value and quantity declared in the invoice.

On that date the goods were taken to the fifth floor of Public Stores, an inspection section, where the case was opened by a verifier and checked by an examiner. The goods passed inspection and presumably were repacked by the verifier and transferred to the "passed pile" of goods on that floor. The examiner then prepared a delivery order, consisting of two of the tickets, a white and a red, which were placed in a post office type box reserved for H. W. Robinson & Co., Inc. on the first floor at Public Stores. An employee of the importer then endorsed the white ticket and turned both tickets over to its trucking company which at 4:19 p.m. on the same day, January 13, 1953, surrendered the red ticket to the customs officials to obtain delivery. Since the delivery platform closed at 4:30 p.m., the customs officials would not deliver the goods that day. The red ticket was sent back up to the fifth floor which under prescribed procedure operated as a notice to send the goods down to the delivery platform. The red ticket should have been filed on the fifth floor thus indicating that the goods had been sent to the first floor platform for delivery to the consignee. On the following day, the customs officials were unable to locate the goods to make delivery. On January 21, 1953, a full week after the disappearance, a search throughout Public Stores failed to uncover the goods. Thereafter the duty paid was refunded.

The trial court had no alternative but to find, and in fact did find, that the goods disappeared from the Public Stores

and that "the manner in which they have vanished remains a mystery" (146 F. Supp. 118, 123).

Jurisdiction

The United States made a motion to dismiss both causes of action for lack of jurisdiction over the subject matter. The trial court granted the motion to dismiss the claim under the Tucker Act, but denied the motion in so far as it sought to dismiss the claim under the Federal Tort Claims Act.

The trial court dismissed the cause of action under the Tucker Act "for lack of jurisdiction because it is not based on an express or implied contract within the meaning of the Act." The court, however, held that the government was subject to suit under the Tort Claims Act and that 28 U.S.C.A. § 2680(c) excepting any claim in respect of "the detention of any goods or merchandise by any officer of customs" from that Act did not bar plaintiff's claim because customs could not detain goods which had disappeared. Judgment was entered for the government, the court concluding that "[P]laintiff has failed to prove that the customs officials were negligent in the handling of the case of woolen goods, * * *."

The Cause of Action Under the Tucker Act

The Tucker Act provides in relevant part:

> "(a) the district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *
>
> "(s) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded * * * upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

The "implied" contracts on which an action may be brought under the Tucker Act are limited to contracts implied in fact as opposed to contracts implied in law, more commonly termed quasi-contracts. Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784; United States v. Minnesota Mutual Investment Co., 271 U.S. 212, 46 S.Ct. 501, 70 L.Ed. 911; Merritt v. United States, 267 U.S. 338, 45 S.Ct. 278, 69 L.Ed. 643. The jurisdictional issue depends upon whether the bailment was a contract implied in fact, and if so, the terms of that contract. It, therefore, becomes necessary to analyze what, if any, contractual attributes a bailment of the type here involved possesses.

The obligation of the government was not artificially created by law but rather stemmed from an implied promise to redeliver the goods as soon as customs had checked them against the invoice. Such a promise need not be formalized in a written agreement or even made the subject of a specific conversation. It arises from the implied promise to return the goods to the lawful owner after the customs inspection has been completed. The elaborate set of ten tickets, at least two of which are designed to restore the goods to the owner, is indicative of this promise.

The government does not contend that the bailment here was "involuntary" in the sense that the goods were thrust upon it. Since it voluntarily undertook a bailment of the goods in question, a promise on its part to use due care during the term of the bailment can and should be implied. In the ordinary bailment "the mutual rights of the parties are often, if not usually, so inadequately fixed by their agreement, that rules of law not based on the agreement, although not inconsistent with it, must be called upon to supply the deficiency." Williston on Contracts, § 1032. It would be the normal and expected ac-

tion on the part of the bailee to promise to use due care, and no judicial inventiveness is required to imply one. It is at least as reasonable to imply such a promise here as it is to imply a promise by the government to pay for lands it has tortiously appropriated as was done in United States v. Dickinson, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (alternative holding), and United States v. Lynah, 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539. The government's attempt to distinguish the case at bar from the Lynah cases by arguing that some "unforeseeable factor such as theft was present in this case whereas in the 'taking' cases the government was or could have been aware that the plaintiff's injuries would flow directly from its actions" contains its own rebuttal because in this case it can only be held for injuries which were reasonably foreseeable from its breach of its promise to use due care.

Nor does absence of any specific bailment fee weaken the promise or deprive the implied agreement of consideration. This appears to have been the rule for many years. In Wheatley v. Low, Cro. Jac. 668, 79 Eng.Reprint 578 (K.B. 1623), the defendant without compensation accepted money from the plaintiff and promised to deliver it to a certain person. Upon his failure to do so, the defendant suffered an unfavorable verdict in an action of special assumpsit. A motion in arrest of judgment on the ground that there was no consideration was denied "for being that he accepted this money to deliver, and promised to deliver it, it is a good consideration to charge him." In Coggs v. Bernard, 2 Ld.Raym. 909, 92 Eng.Reprint 107 (1703), a gratuitous bailee damaged some casks of brandy which he was transporting and was held liable for his negligent handling. Lord Holt in holding that there was consideration underlying the bailee's gratuitous undertaking said in the course of his opinion (2 Ld.Raym. 919, 92 Eng.Reprint 113):

> "But secondly it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but nudum pactum. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management."

The doctrine that a gratuitous bailment is supported by consideration has retained its vitality down through modern times. See First Nat. Bank of Lyons v. Ocean Nat. Bank, 60 N.Y. 278, 284-285; Glanzer v. Shepard, 233 N.Y. 236, 239-240, 135 N.E. 275, 23 A.L.R. 1425; Siegel v. Spear & Co., 234 N.Y. 479, 483, 138 N.E. 414, 416, 26 A.L.R. 1205. In Siegel v. Spear & Co., supra, Judge Crane, in holding that a gratuitous undertaking was an enforceable contract, observed:

> "In the case of Rutgers v. Lucet, 2 Johns.Cas. 92, 95, the law on this point was stated to be as follows: 'A mere agreement to undertake a trust, *in futuro*, without compensation, it is true, is not obligatory; but when once *undertaken*, and the trust actually *entered upon*, the bailee is bound to perform it, according to the terms of his agreement. The confidence placed in him, and his undertaking to execute the trust, raise a sufficient consideration; a contrary doctrine would tend to injure and deceive his employer, who might be unwilling to consent to the bailment on any other terms.'"

A more compelling reason to find consideration exists here because the bailment, although gratuitous, was compulsory and for the exclusive benefit of the bailee, whereas in the cases above cited the bailment was for the benefit of the bailor.

C.F. Harms Co. v. Erie R. Co., 2 Cir., 1948, 167 F.2d 562, presents a somewhat analogous situation. There the charterer of a barge under orders to deliver a shipment of "half-tracks" to the Army at a pier in Weehawken, N.J., left the

barge with the "half-tracks" aboard at the assigned pier. There was no express contract allowing the government to use the barge or defining the terms and scope of the government's possession and control of the barge. The barge became damaged in a storm and the charterer was allowed to bring an action for liability under the Tucker Act "as a bailee under a contract implied in fact." In his opinion Judge Learned Hand noted that "it [the charterer] had the choice either of refusing to deliver the 'half-tracks' at all, or of trusting to such protection as the Army might give." 167 F.2d 564. Likewise here the bailor had the choice of either electing not to ship the goods into this country or of relying upon such protection as the custom officials chose to give the goods.

The first cause of action was properly brought under the Tucker Act.

The Federal Tort Claims Act

The action is also properly brought under the Federal Tort Claims Act. The government strongly urges that the exception to that Act found in 28 U.S.C.A. § 2680(c) bars such a claim and contends that a "detention" as used therein encompasses not only a refusal to deliver goods admittedly in the possession of customs authorities but a loss of goods formerly in their possession. Here the goods had disappeared and a search of the eight divisions of Public Stores revealed that they were no longer in the possession of the customs authorities. In theory, at least, in order to detain, one must possess something to detain. The probable purpose of the exception was to prohibit actions for conversion arising from a denial by the customs authorities or other law enforcement agencies of another's immediate right of dominion or control over goods in the possession of the authorities. An examination of the cases in which the exception was asserted reveals that it is normally used to bar actions based upon the illegal seizure of goods. See,

e.g., Jones v. Federal Bureau of Investigation, D.C., 139 F.Supp. 38, 39; United States v. One 1951 Cadillac Coupe De Ville, D.C., 125 F.Supp. 661. That the exception does not and was not intended to bar actions based on the negligent destruction, injury or loss of goods in the possession or control of the customs authorities is best illustrated by the fact that the exception immediately preceding it expressly bars actions "arising out of the loss, miscarriage, or negligent transmission" of mail. 28 U.S.C.A. § 2680 (b). If Congress had similarly wished to bar actions based on the negligent loss of goods which governmental agencies other than the postal system undertook to handle, the exception in 28 U.S.C.A. § 2680(b) shows that it would have been equal to the task. The conclusion is inescapable that it did not choose to bestow upon all such agencies general absolution from carelessness in handling property belonging to others. Nakasheff v. Continental Ins. Co., D.C., 89 F.Supp. 87, reaching a contrary result, was based in large measure on regulations of the Bureau of Customs but such regulations cannot override the clear wording of the statute.

The Burden of Proof

Once the basic fact of loss has been established, there is a presumption of negligence against the bailee. In applying the presumption it is necessary to decide whether the burden of persuasion as well as the burden of coming forward is shifted to the bailee. Since the loss as well as the transaction preceding it occurred in New York, the law of that forum should be applied here.

New York law is well stated in Dalton v. Hamilton Hotel Operating Co., Inc., 242 N.Y. 481, 485, 152 N.E. 268. There the plaintiff stored two trunks in the basement of an apartment hotel while waiting for her apartment to become available. The bailment was gratuitous. When the plaintiff demanded the trunks they could not be found. The defen-

dant, as here, "gave evidence to the effect that it had adopted a system covering the storage of baggage like that which prevailed in other similar buildings and under which articles were to be stored in the room above mentioned where they were under the custody and watch at all times of reliable employees." The court held (242 N.Y. at page 488, 152 N.E. at page 270):

> "When plaintiff demanded that her trunks be delivered to her at her apartment and the defendant failed to do this, a *prima facie* case was established against the latter even of gross negligence which amounted to a breach of its obligations and which called for an explanation. Canfield v. Baltimore & Ohio R. R. Co., 93 N.Y. 532; Hasbrouch v. New York C. & H.R.R.R. Co., 202 N.Y. 363, 373, 374, 95 N.E. 808, 35 L.R.A., N.S., 537. And we do not think that defendant made such explanation as rebutted the presumption and destroyed the *prima facie* case. It attempted to do this by giving evidence of a system under which trunks were placed in a room under the constant watchfulness of competent and reliable employees. As a matter of fact there is no evidence that the plaintiff's trunks ever came within the operation of this system, for they were traced no further than to show that they were taken to the basement of the apartment house. But if we assume that the trunks were placed in the proper depository under the watchfulness provided by the defendant, we do not think that this fact answers the presumption arising in favor of plaintiff on failure to deliver her trunks or satisfactorily explains their disappearance. Presumptively under this system the trunks should have been in defendant's possession and ready for delivery when called for, and it is the failure of what was to be expected that defendant is called on to explain."

This being the New York law, an *a fortiori* situation should exist where the bailment, as here, was compulsory. Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104, 62 S.Ct. 156, 86 L.Ed. 89, reaffirming by a 5-4 majority a previous decision of an evenly divided court in 313 U.S. 541, 61 S.Ct. 840, 85 L.Ed. 1510, aside from the fact that it did not construe New York law, is distinguishable. There the court was concerned with a voluntary bailment inuring in part to the benefit of the bailor. Here the bailor had no choice of the place of bailment, of the duration of the bailment, or of the bailee. The government took his property for the purpose of assessing the correct amount of duty. For the same reason the test in Fidelity & Guaranty Ins. Corp. v. Ballon, 280 App.Div. 373, 113 N.Y.S.2d 546, is also inapposite.

Where the basic fact — here disappearance of the goods — has strong evidentiary value and where, as here, strong policy reasons exist for requiring an explanation by the party against whom the presumption is applied, the trend has been to shift the burden of persuasion as well as the burden of coming forward. Thus Rule 14 of the Uniform Rules of Evidence, approved in 1953 by the American Bar Association, dealing with the effect of presumptions, provides that "if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the non-existence of the presumed fact is upon the party against whom the presumption operates."

In arguing that presumptions in general should have the effect of shifting the burden of persuasion, Morgan in his article, Presumptions and Burden of Proof, 47 Harv.L.Rev. 59, singles out the bailment situation for particular emphasis. He observes (pp. 79-80):

> "Some presumptions the courts have created because the evidence which will establish the fact is peculiary accessible to one of the parties. Thus, where a chattel in good condition is entrusted to a bailee for hire and he delivers it in bad condition to his bailor, the damage is presumed to have been caused by the bailee's negligence. 'The goods are entrusted to him. He has charge and control of them. He determines the manner of keeping them. He is in possession of such evidence as there is as to the circumstances attending the loss.' Is it reasonable to permit the presumption to be destroyed by the mere production of testimony which would justify a trier in finding due care but which in fact has no tendency to persuade the particular trier that such care has been used? It is true that in judicial discussions of rules of evidence and procedure the dangers of perjury and the supposed efficacy of legal rules to prevent it are greatly overemphasized. Still, is it not true that a doctrine which allows a party to escape liability by merely producing evidence regardless of its actual convincing power is a real incentive to perjury?"

The bailee should bear the burden of persuasion. Gardner v. Jonathan Club, 35 Cal.2d 343, 217 P.2d 961; Redfoot v. J.T. Jenkins Co., 138 Cal.App.2d 108, 291 P.2d 134; Downey v. Martin Aircraft Service, 96 Cal.App.2d 94, 214 P.2d 581; Jacques v. City Parking Service, La.App., 97 So.2d 78; Buckey v. Indianhead Truck Line, 234 Minn. 379, 48 N.W.2d 534. The government in this case is in a position of public trust at least equal to that of common carriers which uniformly must discharge both burdens. Uniform Bills of Lading Act § 12; 49 U.S.C.A. § 88. The goods here were in the exclusive custody and control of the defendant; the circumstances under which the goods were handled were within only its knowledge. Upon it should rest

the burden of establishing by a preponderance of the evidence that the loss was probably caused by some event beyond its control such as an unpreventable fire, theft or other circumstance more consistent with due care rather than negligence.

Accepting the finding made by the trial court that the loss was unexplained, the government failed to discharge its burden of showing that it was not negligent. With the exception of the examiner, the defendant called none of the employees charged with the duty of actually processing the goods in the Public Stores. There was no testimony from the verifier on the fifth floor whose responsibility it was to repack the case and place it in the "passed pile," none from the guard who was charged with caring for the "passed pile," none from the officer who should have received the red ticket and thereupon taken the goods from the "passed pile" onto the elevator, none from the elevator operator who would have taken the goods down to the first floor, and none from the guards and officers on the delivery platform. Nor was the red ticket which should have been filed on the fifth floor prior to the goods being sent down to the first floor introduced in evidence.

The government did no more than establish general prudent procedure analogous to offering evidence of careful manufacturing processes to show that a particular piece of merchandise could not have been defective or to prove a regular business routine to establish that a letter was mailed; but this was not the issue. There was no question that the goods were not delivered. Proof of a course of business was not sufficient to rebut the presumption against the government. Murphy v. Co-op Laundry Co., 230 Minn. 213, 41 N.W.2d 261; Dalton v. Hamilton Hotel Operating Co., Inc., supra. The government did no more than attempt to establish what already was conceded before the trial, namely, to use the language of the trial court, "that the cause of loss was a mystery." The government

cannot avoid liability for the loss by showing that it does not usually lose the goods it handles under routine procedures.

The judgment is reversed and remanded with instructions to enter judgment for the plaintiff.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 78-1175

HATZLACHH SUPPLY CO., INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR WRIT OF CERTIORARI FILED JANUARY 26, 1979
CERTIORARI GRANTED MAY 14, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 78-1175

HATZLACHH SUPPLY CO., INC.,

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INDEX

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Page

Docket Entries

UNITED STATES COURT OF CLAIMS

Case No. 120-76

HATZLACHH SUPPLY CO., INC.

v.

UNITED STATES OF AMERICA

May 17, 1976 —	Filing fee of $10 paid by plaintiff.
	* * *
June 15, 1976 —	Defendant's answer filed.
	* * *
October 31, 1977 —	Defendant's motion for summary judgment filed.
	* * *
February 21, 1978 —	Plaintiffs opposition to defendant's motion for summary judgment filed.
	* * *
July 14, 1978 —	Petition dismissed. Opinion by Judge Kunzig.
	* * *
August 2, 1978 —	Plaintiff's motion for rehearing and suggestion for rehearing en banc filed.
	* * *
August 11, 1978 —	Defendant's response to plaintiff's motion for rehearing.
	* * *
September 29, 1978—	Court entered order denying plaintiff's motion for rehearing.

UNITED STATES COURT OF CLAIMS

HATZLACHH SUPPLY CO., INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

PETITION
No. 120-76

COMPLAINT FOR DAMAGES

The Plaintiff, HATZLACHH SUPPLY CO., INC., by its attorney, MARK LANDESMAN, complaining of the defendant herein, alleges as follows:

FOR A FIRST CAUSE OF ACTION

1. Plaintiff was at all the times hereinafter mentioned a corporation organized under the laws of the State of New York with its present principal office and place of business at 928 Broadway in the City of New York.

2. This action is brought under 28 USC sec 1491 as hereinafter more fully appears.

3. Plaintiff was at all times hereinafter mentioned engaged in the business of importing and merchandising cameras, films, flash bulbs, razor blades and various other merchandise.

4. On or about March 17, 1970, a container of merchandise numbered 57733, containing films, camera kits and flash bulbs, arriving from Hamburg via Bremen, Germany and consigned to and owned by Plaintiff, herein, was seized at the Sealand Terminal, Elizabeth, New Jersey, by the Bureau of Customs, an agency of the Defendant UNITED STATES OF AMERICA and was subsequently and belatedly referenced as Seizure No. 24443.

5. On or about April 3, 1970 two containers of merchandise, numbered 61934 and 40556 respectively, con-

taining films, flash bulbs, razor blades, electric shavers, cassettes, cartridges, tape recorders and various other items, arriving from Hamburg via Bremen, Germany and consigned to and owned by Plaintiff herein, were seized at the Sealand Terminal, Elizabeth, New Jersey by the U.S. Bureau of Customs and were subsequently and belatedly referenced as Seizure No. 25172.

6. On or about October 13, 1970, the U.S. Bureau of Customs offered to remit the aforementioned seizures in return for a penalty of $40,000 in response to an administrative petition filed by Plaintiff with the U.S. Department of the Treasury.

7. As soon thereafter as possible Plaintiff did pay $40,000 to the U.S. Bureau of Customs in order to obtain the return of his seized merchandise valued at $577,230.93.

8. While still in the custody and possession of the U.S. Bureau of Customs, various merchandise from both of the above mentioned seizures totalling $165,220.50 in value was lost or stolen.

9. As a result thereof, by its failure to return to Plaintiff the total amount of goods seized from it, as it agreed to do, the Defendant UNITED STATES OF AMERICA through its agents and servants of the Bureau of Customs, breached the contract of bailment.

10. As a result of the above, Plaintiff was caused to suffer damage in the amount of $165.220.50.

FOR A SECOND CAUSE OF ACTION

11. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "9" as if more fully set forth herein.

12. Said seizures were capricious, arbitrary, unreasonable, unlawful and not sanctioned nor colored by the intended purpose of the statutes underlying such seizures.

13. That although said seizures actually occurred on March 17, 1970 and April 3, 1970 respectively Plaintiff was first given official notice thereof on May 28, 1970 and June 3, 1970, respectively.

14. That while Plaintiff filed the aforesaid administrative petitions to the Treasury Department almost immediately thereafter and fully cooperated with the government throughout, the Bureau of Customs, nevertheless, first advised Plaintiff on October 13, 1970 that the forfeitures would be remitted upon payment of a $40,000 penalty.

15. That said actions on the part of the Bureau of Customs constituted an unreasonable detainer of Plaintiff's property and deprivation without due process.

16. That the aforesaid actions on the part of the Bureau of Customs deprived Plaintiff of a large percentage of his working capital for an unreasonable amount of time.

17. That the losses and pilferage occasioned by the handling of the Bureau of Customs in breach of the contract of bailment resulted in the Plaintiff being deprived of a large percentage of its working capital.

18. That all of the aforesaid caused Plaintiff to lose face and good will with its customers and to lose numerous contracts all to the detriment of its business.

19. That by reason of the aforesaid Plaintiff was caused to lose business and suffer damages in the amount of $2,000.000.

WHEREFORE, Plaintiff, HATZLACHH SUPPLY CO., INC. respectfully requests relief against the Defendant, UNITED STATES OF AMERICA in the amount of

a. $165,220.50 on the first cause of action.

and

b. $2,000,000 on the second cause of action, together with interest and costs of this action and for such and further relief as to this Court may seem just and proper.

/s/ Mark Landesman

MARK LANDESMAN
ATTORNEY FOR PLAINTIFF

* * * * *

UNITED STATES COURT OF CLAIMS

No. 120-76

[Caption omitted]

DEFENDANT'S ANSWER

For its answer to plaintiff's petition defendant admits, denies and alleges as follows:

1. Denies for lack of knowledge or information sufficient to form a belief as to the truth thereof.

2. The allegations of paragraph 2 constitute conclusion of law to which no response is required, but to the extent that said allegations may be deemed to be allegations of material fact, they are denied.

3. Denies for lack of knowledge or information sufficient to form a belief as to the truth thereof.

4. Admits the allegation of paragraph 4 except denies that the seizure was "belatedly" referenced and avers that the date of seizure was March 24, 1970.

5. Admits the allegations of paragraph 5 except denies the seizures were "belatedly" referenced and avers that the date of seizure was April 6, 1970.

6. Admits the allegations of paragraph 6.

7. Admits that plaintiff paid $40,000 to the United States Customs Service (not the "U.S. Bureau of Customs") in order to obtain the return of the seized merchandise; denies the remaining allegations of paragraph or for lack of knowledge or information sufficient to form a belief as to the truth thereof.

8. Admits that some merchandise was lost from the first seizure. Denies the remaining allegations for lack of knowledge or information sufficient to form a belief as to the truth thereof.

9. Denies that any contract of bailment was created by the seizures; further denies that defendant breached any sort of contract in connection with the seizures.

10. Denies the allegations of paragraph 10 to the extent it may be deemed to allege that defendant breached a contract. Denies the allegation of the amount of damages for lack of knowledge or information sufficient to form a belief as to the truth thereof.

11. Defendant hereby repeats and incorporates by reference each and every answer to paragraph 1 through 9 of the petition as if fully set forth.

12. Denies the allegations of paragraph 12.

13. Admits that the notices of seizure were given on the dates alleged, but avers that the actual dates of seizure were March 24 and April 6, 1970.

14. Admits the allegation that plaintiff was notified on October 13, 1970 that the forfeitures would be remitted upon payment of a $40,000 penalty. The remaining allegations as to the immediacy of plaintiff's filing of administrative petitions and the extent of its cooperation with the Government are mere conclusions of the pleader not requiring an answer; to the extent they may be deemed allegations of material facts, they are denied.

15-17. Denies the allegations of paragraphs 15-17.

18. Denies the allegations of paragraph 18 to the effect that plaintiff lost face and good will and contracts for lack of knowledge or information sufficient to form a belief as to the truth thereof. Denies the allegation that any such losses were caused by actions of the Government.

19. Denies the allegations of paragraph 19 to the effect that plaintiff suffered damages in the amount of $2,000,000 for lack of knowledge or information sufficient to form a belief as to the truth thereof. Denies the allegation that defendant is responsible for any such damages.

20. Except as herein admitted, denied or qualified, denies all allegations of material fact contained in the petition.

FIRST AFFIRMATIVE DEFENSE

21. Plaintiff fails to allege the essential elements of a contract with the United States; accordingly, the petition fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

22. To the extent plaintiff attempts to state a claim based upon an illegal seizure, said claim sounds in tort and is therefore outside the jurisdiction of this court.

THIRD AFFIRMATIVE DEFENSE

23. Plaintiff's claims accrued at the latest on or before October 6, 1970, the date upon which the forfeitures were remitted. Plaintiff's petition herein was not filed until March 17, 1976, almost six years from the original seizure. Because of this unreasonable delay, defendant has been severely prejudiced in its ability to obtain evidence relating to the person or persons responsible for the losses in question. Accordingly, plaintiff's claim is barred by the doctrine of laches, or at the least, plaintiff should be held to have a heavier burden of proof.

WHEREFORE, defendant demands that plaintiff's petition be dismissed and that defendant be granted such other and further relief as may be just and proper.

REX E. LEE
Assistant Attorney General
Civil Division

GEORGE M. BEASLEY, III
Attorney, Civil Division
Department of Justice

UNITED STATES COURT OF CLAIMS

No. 120-76

[Caption omitted]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

* * * * *

STATEMENT OF FACTS

This case arises out of the seizure in 1970 by the United States Customs Service (then known as the Bureau of Customs) of the contents of three cargo containers of miscellaneous merchandise being imported by plaintiff from Germany (Ex. A, p. 1). The first one-container shipment was seized in March 1970 for violation of 19 U.S.C. §1592, on the grounds that plaintiff had attempted to introduce into the commerce of the United States merchandise by means of false statements as to its value and quantity in an immediate delivery application and that the manifest and bill of lading misdescribed the merchandise. (Id. p. 3). The second shipment of two containers was seized in April 1970 for violation of the same statute, on the grounds that plaintiff had attempted to introduce into the commerce of the United States imported merchandise by means of an altered foreign-trade zone application relating to the description of the merchandise and its value, and that the manifest and bill of lading contained false and misleading descriptions of the contents of the containers. (Ibid.) Accordingly, under the provisions of §1592, the contents of the containers were declared forfeited to the United States.

Plaintiff, through counsel, filed a petition pursuant to 19 U.S.C. §1618 for remission of the forfeitures (Ex. B). Such statute allows the Secretary of the Treasury to remit a forfeiture if he finds that it was incurred without willful

negligence or intent to defraud or violate the law, or if he finds that there are mitigating circumstances justifying the remission. If so, such remission may be done on such terms and conditions as he deems reasonable and just. The functions of the Secretary under this statute had been delegated to the Commissioner of Customs and on or about October 13, 1970, the Commmissioner offered to remit the seizures in return for payment by plaintiff of a penalty of $40,000 (Pet., §. 6.) Thereafter, plaintiff paid such penalty and the merchandise from the containers which was in the possesion of Customs was released to plaintiff. (Pet., § 7.)

On March 17, 1976, only one day short of six years from the time plaintiff attempted to enter the shipment covered by the first seizure (Ex. A, p. 1), plaintiff filed this suit, contending that during the time the containers were in the "custody and possession" of Customs,[1] various items of merchandise from both seizures was "lost or stolen" (Pet., §8). As a result, plaintiff seeks $165,220.50 for the value of the lost or stolen goods and $2,000,000 in consequential damages.

* * * * *

[1]Defendant denies that the merchandise was lost or stolen while in the custody or possession of Customs. On information and belief, it contends that any property which disappeared did so while the containers and their contents were in the sole custody or possession of plaintiff's agent, the shipping company. Such company, Sea-Land Service, Inc., has been notified under Rule 41 to assert any interest it may have in this suit, and has appeared as a third-party defendant. Due to the long delay by plaintiff in filing this suit, the facts concerning the pilferage or loss from the shipments are a matter of dispute. Because the Court clearly lacks jurisdiction over plaintiff's alleged contract action against the Government, however, it is not necessary to go into these disputed issues.

EXHIBIT A

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June 5, 1970

Regional Commissioner of Customs
United States Custom House
Bowling Green
New York, New York 10004

Attention: I. D. Krawet, Assistant Director
Claims and Penalties Division

Re: Hatzlachh Supply Co., Inc.
Seizure No. 24443

Dear Sir:

Petition is herewith made under the provisions of 19 U.S.C., §1618 for relief from the forfeiture declared by your office in your seizure and penalty notice dated May 28, 1970 in the referenced matter. The circumstances surrounding the attempted importation of the merchandise, which we believe justify the grant of relief, are as follows:

On or about March 18, 1970 the petitioner attempted to obtain the release of a container containing various merchandise which had been landed from the S.S. Portoria at the Sealand Terminal in Port Elizabeth, New Jersey, several days earlier. It was intended that the merchandise be released under the immediate delivery procedures provided in 19 U.S.C. §1448(b) and Customs Regulations §8.59. Pursuant thereto Beacon Shipping Co., Inc., a licensed customhouse broker located at 30 Vesey Street, New York, New York, was provided with the necessary documentation and instructed to prepare a proper application and special permit for immediate delivery.

The petitioner has been informed that an application was prepared as requested, except that the merchandise description, taken from the bill of lading rather than the invoices, was erroneous. The petitioner has no personal knowledge of the reason the merchandise description on the bill of lading did not conform to the invoice description. But the petitioner states unequivocally that he in no way contributed, either actively or passively, in the erroneous description, and that his only instruction to the broker was to prepare a proper application.

Upon presentation at the Sealand Terminal the customs officials refused to permit entry because of the obvious and apparent discrepancy between the merchandise description on the immediate delivery application and permit and the invoice. The papers were returned by the truckman to the customhouse broker's office for correction.

The petitioner has been informed that the documents prepared by the broker in order to rectify the problems were correct to the extent that the merchandise descriptions were the same on the application and permit form and on the invoices. However, and apparently this is the purported basis for the seizure although ex post facto, the broker's clerk who prepared the application and permit committed an error in calculating the nominal value of the shipment and omitted two of the four invoices covering the merchandise which had been consolidated into a single container shipment. The error in calculating arose because, although the currency of three of the four invoices was United States dollars, the clerk, a Mr. Thomas Ramono, treated all four invoices as if they were stated in Deutsche marks and divided the total of the whole by four. This factor was selected because it represents the conversion factor between Deutsche marks and United States dollars.

The second error in connection with this transaction occurred because the broker thought that the pro-forma invoice which had been prepared to cover two of the invoices duplicated one of the invoices actually submitted.

The seizure poses several problems in the application of the mandate of 19 U.S.C. §1592, the resolution of any or all of which, we believe, would justify the grant of immediate substantial relief from the burdens imposed thereby if not outright cancellation of the case. Among the factors to be considered are:

(1) The erroneous documentation did not constitute an entrance, introduction, or attempt to enter or introduce merchandise into the commerce of the United States.

(2) The documentation was erroneous on its face, thereby obviating the inference that errors beneficial to the importer were an attempt at nondisclosure of relevant information.

(3) The petitioner was prevented under color of law from making a formal entry because its documents were seized.

(4) The merchandise was not reduced to seizure and notice given as required by law until May 28, 1970, although it had been detained under color of law since March 17, 1970. The hardship suffered by the petitioner as a result of this unlawful procedure renders illusory the benefits Congress intended to afford under 19 U.S.C. §1618.

(5) Failure to mark merchandise with the country of origin is not a violation of 19 U.S.C. §1592 and does not justify a seizure.

(6) The Government's inventory is erroneous.

(7) The quantity of merchandise actually landed is *less* than that invoiced in every material respect.

(8) The invoiced values of the merchandise exceed the appraised foreign value thereof even though the appraised foreign unit values are higher in most cases than the contract prices as stated on the invoices.

(9) This case has been investigated at length, in the United States and abroad. There is not a scintilla of evidence of intent to commit any act proscribed by 19 U.S.C. §1592,

(10) Throughout its existence Hatzlachh Supply Co.,

Inc., the petitioner herein, has never been found in violation of 19 U.S.C. §1592.

(11) Although threatened with criminal prosecution the petitioner has cooperated with the Government to the fullest extent compatible with its constitutional rights, and has requested that persons outside the United States extend their fullest cooperation, to the end that this case be rapidly disposed of.

The power vested in the authorities by 19 U.S.C. §1592 to seize merchandise has been held to be lawful by the courts on numerous occasions. It is not the naked existence of this power which is challenged by this petition, but its exercise in a manner which is arbitrary and deprives the importer of the opportunity to make a correct and lawful entry in the first instance. Simply put, an application and special permit for immediate delivery is not an entry. Entry is a specific statutory concept implemented by a specific procedure, and is an act which the importer usually must perform in order to complete a lawful importation. As the use of the term entry does not suffice to cover withdrawal from warehouse for consumption, however, the language of "introduction into the commerce of the United States" can be seen to amply accomplish this purpose. Unfortunately, the Bureau has chosen in this case to expand the reach of the statute beyond its plain language and clear purpose. It has taken a document of no substantial legal significance, which is required by law to be superseded with proper, legal documentation, and sought to convert it into an attempt to perform a specifically defined legal act, the entry or introduction of merchandise into the commerce of the United States.

The invalidity and uselessness of this procedure can be demonstrated in two ways. First, if on their face, the papers were faulty the Government had available to itself the very simple expedient of refusing to grant the permit for immediate delivery; second, in any case where the only incorrect document is an erroneous application for im-

mediate delivery and the papers are otherwise correct and make full disclosure in all respects, we believe it would be so clearly inequitable and contrary to the intention of the statute that the Government should not institute a penalty proceeding.

It seems to have been lost to view in this case that the power of customs personnel to seize without process is an extraordinary and unique power which should not be invoked unless it is necessary to prevent dispersal of the goods. It is never necessary to seize where the merchandise is in Government custody and the Government may lawfully detain it in its custody without a seizure. The importer has no right to obtain a permit for the release of the goods if his papers are not in order. In the absence of palpable proof of intent to deprive the Government of revenue or otherwise evade the customs laws, which behavior is in itself criminal, a seizure which takes place while the merchandise is in the custody of the Government and before the importer has completed his formal entry of the goods is premature and constitutionally invalid because it is violative of due process of law. We submit that the seizure in the case to which this petition is addressed was and remains premature and defective.

The petitioner is entitled by rule of law to the presumption that its acts are lawful. So long as its acts do not rule out the possibility that the law will be observed it must be deemed that the law would have been observed. This implies that all imported merchandise would have been declared at its appropriate entered value and proper estimated duties would have been deposited. Assuming these acts had taken place it is incredulous that the Government, to vindicate a tehcnicality, would institute a penalty proceeding, and we have sufficient confidence in the Government to believe that no such case exists. The petitioner is entitled to the assumption these acts would have taken place if it had been given the opportunity and it is submitted that this seizure is accordingly invalid.

You state in your letter of May 28th that the seizure of the petitioner's goods took place on March 17, 1970. Notice of the seizure was not issued for eleven weeks until May 28, 1970. From the available information it appears that most of the interim period was spent in an effort to determine whether the seizure should have taken place. After extended investigation which apparently produced nothing the file was referred to the United States Attorney for the District of New Jersey who declined prosecution. Not satisfied with the original inventory of the goods, a reinventory was ordered. (The petitioner maintains that the inventory is still incorrect and requests the opportunity to examine the goods itself.) During this entire period of time the petitioner has been deprived of the use of its merchandise without having been informed that it was accused of any specific violation of law. Furthermore, the statement of appraisement released to the petitioner's attorneys indicates that the quantities which survived the opening of the container in a public place accessible to strangers on the pier were smaller than the quantities stated on the invoices.

The allegation that the documents understated the values and quantities of the merchandise is incorrect. Invoices covering every iota of the merchandise were submitted to customs and rejected. In fact, the invoices which were erroneously omitted on the occasion of the second tender of documents had been submitted earlier. Understatement implies a consistent pattern, one would think, and certainly there is no consistent pattern here. In every instance of which the Government could conceivably complain in this case the documentation was plainly and clearly erroneous, a situation hardly compatible with an underevaluation situation of any kind, intentional or otherwise.

The petitioner takes issue with some of the merchandise totals reported in the Government's inventory, as follows:

(a) PX-135-20 Plus X Pan film is packed in cartons of 30 cans of ten rolls each. There was simply no way for five extra rolls of film to have found their way into the shipment.

(b) The petitioner doubts the accuracy of the inventory of camera kits as only 2900 were shipped and paid for and not 2925.

(c) Unless some flashcubes disappeared during the examination on the pier the inventory is too low, as only one carton was short-shipped and the quantity missing exceeds the contents of a single carton.

(d) The inventory shows an overage of 500 rolls of CX 620 size film and a shortage of 500 rolls of CX 120 size film. It would be interesting to know what difference it could possibly make even if the Government's inventory figure is correct, as the two kinds of film are identical in price and every other respect except spool size.

(e) The only significant discrepancy between the invoice totals and the Government's inventory in fact, is one which, if the importer's figures are accepted, works to the importer's detriment. Taking an average price of 82.5¢ per roll of CX 126-20 film the value of the 57,400 rolls invoiced but not inventoried is $47,355. At an average price of 68¢ per roll of CX 126-12 film (the films differ only in that the cheaper film is 40% smaller in length) the value of the purported overage of 50,181 rolls is only $34,123.08. The petitioner believes that actually the inventory is incorrect in that approximately 50,000 rolls of the higher-priced CX 126-20 film were listed on the inventory as cheaper priced CX 126-12 size film. The petitioner has no explanation for the shortage of 7219 rolls of CX 126-20 film which were invoiced, shipped and presumably landed. However, as the only alternative to the conclusion that these goods were not landed is that they disappeared while in customs custody, it must be assumed they were not landed.

This petition has previously adverted to the fact that the petitioner has extended to the Government every possible effort at cooperation within the circumstances. It has done so not only out of the conviction of its innocence of any wrongdoing, but to precipitate the disposition of this case in order that the seized merchandise may be removed from

limbo. The petitioner's concern in this regard derives from the fact that film is a dated commodity which must be in the hands of the storekeeper well in advance of its expiration date to be salable. That time has already passed.

The petitioner has as of now sustained serious financial loss as a result of this seizure. It is entitled to a prompt disposition of this case by the cancellation of the forfeiture claim and the immediate restoration of the goods.

HATZLACHH SUPPLY CO., INC.

By /s/ Morris Broker
Morris Broker, President

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Joseph S. Kaplan
of Counsel

EXHIBIT B

June 26, 1970

Regional Commissioner of Customs
United States Custom House
Bowling Green
New York, New York 10004

Attention: I.D. Krawet, Assistant Director
Claims and Penalties Division

Re: Hatzlachh Supply Co., Inc.
Seizure No. 25172 of April 3, 1970

Dear Sir:

Petition is herewith made for cancellation of the forfeiture incurred as a result of the referenced seizure of the petitioner's merchandise.

As stated in your letter of June 3, 1970 giving notice of the seizure and forfeiture, this case arises from the seizure of two shipping containers numbered 61934 and 40556 at the Sealand Terminal in Port Elizabeth, New Jersey. At the time of seizure the containers were in customs custody and a permit had been obtained by the petitioner for their removal to the foreign trade zone as non-privileged merchandise. The original application for a foreign trade zone entry permit filed at the Customshouse in fact failed to specify that the shipment included film, and in fact stated that the value of the goods in the containers was $60,000. The permit presented to the customs inspector at the terminal, however, had been corrected to include the film among the merchandise described and the value had been corrected to $160,000.

The issue presented by this case is whether the foregoing facts constitute a violation of 19 U.S.C. §1592. That section prohibits and penalizes the making of any false statement or declaration by certain designated persons in connection

with the entry or attempted entry or introduction or attempted introduction of merchandise into the commerce of the United States. It is claimed in behalf of the petitioner that no such event occurred, and that the seizure under the authority of Section 1592 was improvident and illegal.

Removal of merchandise to the foreign trade zone is the very opposition of its introduction into United States commerce. As that act constitutes a withholding of the merchandise from domestic commerce, the statute provides that merchandise may be brought into the zone "without being subject to the customs laws of the United States" except as elsewhere provided in Chapter 1A of Title 19, United States Code Sec. 19 U.S.C. §81c. Notably, Chapter 1A makes no mention whatsoever of §1592 and it is therefore not applicable to actions taken pursuant to the Free Trade Zones Act, 19 U.S.C. §§ 81a to 81u. A foreign trade zone application to admit merchandise is a document existing under the authority of the Free Trade Zones Act. As Chapter 1A of Title 19 does not provide that such a document shall be governed by the provisions of 19 U.S.C. §1592, it is not so governed, and is in fact exempted from such coverage.

The reasons for the distinction in treatment between documents pertaining to the introduction of merchandise into the United States commerce and those which do not, are apparent upon the most cursory examination. Merchandise introduced into United States commerce is subject to the payment of duty, and merchandise sent to the foreign trade zone is not. Merchandise subject to the payment of duty must be documented in a manner consistent with the necessity to appraise and liquidate, while it is sufficient that non-privileged foreign merchandise sent to the foreign trade zone be identified and right to possession established. If merchandise is removed from the foreign trade zone for entry into United States commerce it is subject to the same standards of documentary propriety as any

other importation. We wish to emphasize, however, that while analysis and speculation concerning the rationale for statutory dictates may be intersting, it is the plain language of the statute exempting foreign trade zone movements from the application of the customs laws which controls.

We are not suggesting that the Bureau of Customs has no interest in foreign trade zone operations. Its interest is explicitly recognized in the mandate to the Secretary of the Treasury to prepare regulations concerning the zone, and that to the Zone Board to cooperate with the Bureau. But the Bureau has no authority to prevent the movement of merchandise to the zone if the merchandise is not prohibited by law. The interposition by the Bureau in the movement of the goods is a denial of the rights afforded by 19 U.S.C. §81c where the action taken is not consistent with the Foreign Trade Zone Act.

The Customs Regulations provide for the examination of non-privileged foreign merchandise by Customs, but they also provide a time. Unlike merchandise about to be released into United States commerce which must be examined promptly, merchandise destined for the zone is subject to examination in the zone after its arrival. See Customs Regulations, 1943, §30.5(f). As merchandise destined for the zone is not to be entered into United States commerce there is no reason to take the time of inspectors concerned with entry to examine goods not about to be entered.

We have asserted the reasons why we contend that the seizure to which this petition is directed was not authorized by law and should not have taken place. We would also, for the record, make mention of the so-called "alteration" of the application. The application was not prepared by the petitioner's president, but in his behalf by a licensed customs broker. The broker's clerk omitted to enumerate film among the merchandise inside the seized containers, and in fact set down a nominal value for the goods less than

the invoiced value. The papers were presented to Customs as provided in §30.5(d), Customs Regulations of 1943, and the duplicate copy of the application was stamped with a permit and returned. All this happened on a Friday afternoon. There was no time that day to move the goods, but the petitioner's president called the broker to see if the permit had been obtained. The broker stated that it had, and read the permit to him over the telephone. The petitioner's president immediately said that it was incorrect. As a result of this advice the petitioner's president was subsequently informed that he was to correct the permit copy of the application, and that the original at the Customhouse would be corrected also. He did so.

Even assuming that Chapter 1A of Title 19 provided a penalty for submitting corrected documents, the question which would require an answer in assessing the penalty would be the gravity of the injury. We can think of no injury sustained by the Government in this case.

The petitioner, however, has suffered real injury which remains unredressed. Its merchandise, of a purported domestic value of $315,471.93, has been seized and has thus remained for the last three months. Worse, much of the merchandise consists of stainless steel razor blades which are about to lose their market value because of the advent of chromium coated blades. In addition, the merchandise also consists in part of dated film which even now cannot reach the petitioner's customers on time to command the price of fresh merchandise. We think, too, that the Government should not be unmindful of the harm to the conduct of the petitioner's business resulting from the freezing of $315,471.93 of its assets.

Finally, while the Government has tied up a man's business because of an inadvertent clerical error, the importer has sustained an irreparable loss. For the inventory furnished by the Government, even taking the several apparent errors into account, shows that a substantial shor-

tage of goods took place after the containers were unsealed on the pier and while in Customs custody.

It is hoped that the remaining merchandise will be made available for the petitioner's disposition without further delay, and the case cancelled.

HATZLACHH SUPPLY CO., INC.

By /s/ Morris Broker
Morris Broker, President

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Joseph S. Kaplan
For Counsel

UNITED STATES COURT OF CLAIMS
No. 120-76
[Caption omitted]

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

* * * * *

STATEMENT OF FACTS

Plaintiff's Claim arises from the seizures in 1970, by the United States Customs Service of the contents of 3 containers being imported by plaintiff.

These containers were seized on the basis of plaintiff's alleged violation of 19 U.S.C. 1592 based on the claim that plaintiff's invoice documents improperly described the merchandise. This section provides that if there is an attempt thereby to willfully deprive the United States Government of any revenue, then this merchandise shall be *"subject to forfeiture."*

As these seizures are provisional and unilateral acts on the part of authorized agents of Customs prior to a full disposition and determination of the merits thereof, the statutes naturally provide a means of resolution.

19 U.S.C. 1618 provides for an administrative application to the Treasury for remission of the forfeiture based on either lack of cause on the part of Customs or mitigating circumstances on the part of the importer. Pursuant thereto, the Secretary may offer to remit the forfeiture either with or without penalty. If the applicant importer fails to receive an offer from the Secretary or if he is otherwise dissatisfied with such offer he can pursue a full plenary forfeiture proceeding in district court pursuant to 28 U.S.C. Section 2465.

28 U.S.C. 2465 provides that if the importer claimant should prevail then "such property shall be returned forthwith to the claimant."

Plaintiff herein pursued the above described procedures and successfully concluded an agreement with the Treasury

for the remission of the forfeiture in return for the payment of a $40,000 penalty.

Plaintiff complied with the terms of the agreement and paid the $40,000 penalty to the Treasury. Upon return to plaintiff of the containers, it was however found that sizable quantities thereof were missing and had been pilfered in the interim. Plaintiff thus filed suit contending that during the time that the containers were in the possession and custody of Customs various items of merchandise totalling a value of $165,220.50 were stolen.

* * * * *

UNITED STATES COURT OF CLAIMS

HATZLACHH SUPPLY COMPANY, INC.

v.

The UNITED STATES.
No. 120-76

July 14, 1978.
Rehearing and Rehearing En Banc
Denied Sept. 29, 1978.
579 F.2d 617

Before DAVIS, KUNZIG and BENNETT, Judges.

ON DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

KUNZIG, Judge:

This action, involving plaintiff's claim that the Government breached an implied-in-fact contract which allegedly arose from the detention of certain merchandise by United States Customs Service personnel comes before the court on defendant's motion for summary judgment and plaintiff's opposition thereto. Because we essentially agree with the Government's argument concerning the clear congressional intent to retain sovereign immunity with regard to claims arising out of detentions of materials by customs inspectors, we hold that plaintiff's petition does not state a claim upon which relief can be granted and, accordingly, we grant defendant's motion.

Hatzlachh Supply Company (Hatzlachh or plaintiff) alleges that in 1970 it imported certain camera supplies and miscellaneous items from Germany which, upon arrival in port in New Jersey, were seized and declared forfeited by the United States Customs Service (USCS). Plaintiff followed statutory and regulatory procedures in seeking

relief from the forfeiture. *See* 19 U.S.C. § 1618 (1970); 19 C.F.R. § 171.11-13 USCS, in October of 1970, agreed to return the forfeited materials upon payment of a $40,000 penalty. Hatzlachh complied with the terms prescribed by the USCS and paid the $40,000 into the Treasury of the United States. Upon the return of the seized material to plaintiff, it was noted that certain items were inexplicably missing. Hatzlachh brought suit in this court seeking to recover $165,220.50 (plus $2,000,000 for alleged loss of "face and good will . . .") which it alleges was the total value of the goods that were "pilfered" or "stolen" while the forfeited material was in the possession of the defendant.

Defendant now moves for summary judgment on grounds that plaintiff has failed to state a claim within the jurisdiction of this court. Plaintiff's petition set forth two separate causes of action. The first involved an alleged breach of a contract of bailment while the second alleged that the seizures were "capricious, arbitrary, unreasonable, unlawful and not sanctioned nor colored" by law and that they "constituted an unreasonable detainer of plaintiff's property and deprivation without due process."

We agree with the defendant that plaintiff's second cause of action is unsupportable. Plaintiff's own petition to the Regional Commissioner of Customs *admitted* that the merchandise description submitted to the USCS officials was "erroneous" and that the discrepancy between the merchandise description and the items actually landed were "obvious and apparent." Although plaintiff's petition goes on to question the propriety of the USCS's actions against the goods, such "obvious and apparent" deviations from prescribed USCS import procedures certainly would render the USCS's action non-arbitrary and non-capricious, although perhaps of questionable severity.

Even if we should determine that the defendant's actions were so arbitrary and capricious as to be outside the broad statutory and regulatory discretion and authority accorded

the USCS, this portion of plaintiff's second cause of action would then sound in tort, and this court would be without jurisdiction. 28 U.S.C. § 1491 (Supp. V 1975); *Algonac Mfg. Co. v. United States*, 428 F.2d 1241, 192 Ct.Cl. 649 (1970).

The second portion of plaintiff's second cause of action is equally without merit. Defendant's declaring a forfeiture of goods under 19 U.S.C. § 1592 (1970) is hardly comparable to a "taking" for public use without just compensation, which would allow plaintiff to recover pursuant to the Fifth Amendment's ban on such taking. *See, e.g., Huerta v. United States*, 548 F.2d 343, 212 Ct.Cl. 473, *cert. denied*, 434 U.S. 828, 98 S.Ct. 108, 54 L.Ed.2d 88 (1977). Again, plaintiff is faced with the situation where the forfeiture was either declared in accordance with statutory and regulatory guidelines, in which plaintiff *was* accorded the "due process of law" and there was no "taking," or else the action taken was outside statutory and regulatory authority, in which case this court is without jurisdiction because plaintiff's action sounds in tort.

Plaintiff's first cause of action, however, based on the Government's breach of an implied contract of bailment, presents a much more difficult and serious problem. Plaintiff contends that the USCS, in taking custody of the goods, made only a provisional seizure pending full disposition on the merits. Plaintiff further relies upon the language of 28 U.S.C. § 2465 (1970), which states:

> Upon the entry of judgment for the claimant in *any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant* . . . (emphasis supplied in plaintiff's brief)

for the proposition that the Government's allegedly provisional seizure created an implied contract of bailment between Hatzlachh and the United States. Plaintiff's logical conclusion is that, in failing properly to protect and

return some of the material seized, defendant breached this implied contract of bailment.

Plaintiff's argument gains considerable support from the decision of the Second Circuit in *Alliance Assurance Company v. United States*, 252 F.2d 529 (2d Cir. 1958). In that case involving similar circumstances, the court, in a two-part holding, determined that an implied-in-fact contract did exist[1] between the USCS and the importer and that the importer had an alternate cause of action under the Federal Tort Claims Act. The Federal Tort Claims Act assumes significance in *Alliance*, as it does in the case at hand, for two reasons. One is the resemblance which the importer's claim of a breach of contract bears to a claim for a breach of duty in tort. The other reason is that such claims in tort are explicitly barred by 28 U.S.C. § 2680(c) (1970), which excepts from the coverage of the Tort Claims Act:

> Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs . . . .

The *Alliance* court, interestingly, found that the § 2680(c) exclusion did not apply because the merchandise in question had disappeared and goods which had disappeared could not have been subject to "detention" within the meaning of the statute. Even more to the point, however, the court in *Alliance* reasoned that the Government had, by exerting its statutory authority over the goods, implied a promise to return the goods to the importer. Thus, the court determined that plaintiff in *Alliance* had causes of action under both the Tucker Act, 28 U.S.C. § 1491 (Supp. V 1975) and the Tort Claims Act.

[1]Since the claim in *Alliance* was for an amount less than $10,000, the Federal District Court had concurrent jurisdiction with the Court of Claims. 28 U.S.C. § 1346(a)(2) (1970).

The defendant argues that *Alliance* was *wrongly* decided and is, in any event, distinguishable from the case at hand. It contends that the *Alliance* court, in reversing its own district court, incorrectly utilized the "loose, umbrella concepts of bailment law" to broaden drastically the Tucker Act's limited waiver of sovereign immunity. The Government further points out for support this court's "venerable precedent" in *Schmalz v. United States*, 4 Ct.Cl. 142 (1868), where we held that the general law requiring customs inspection did not imply a contract with the Government.[2] Finally, defendant cites the rationale of the district court judge in *Alliance* in arguing that no implied-in-fact contract could exist because there was no mutual assent.

Even if the *Alliance* decision were correct, continues the Government, that case was distinguishable from the one at hand. In *Alliance*, the court was faced with a situation where the goods which subsequently disappeared had merely been detained for inspection pursuant to 19 U.S.C. § 1499, while, in our present case, the goods had actually been seized subject to forfeiture pursuant to 19 U.S.C. § 1592 (1970), because a violation of the customs laws had already been found. The defendant concludes that, since goods seized subject to forfeiture (under § 1592) can be returned only after some judicial discretionary or administrative determination has been made, no implied-in-fact contract could possibly have arisen out of the seizure.

The Government's final contention centers on the important public policy involved in allowing customs officials to go about their work unimpeded by fear of "implied in fact" contract claims each time they must seize or detain some item—and on the related theory that waivers of

[2]Defendant also notes that *Alliance* stands alone in holding the § 2680(c) Tort Claims Act exclusion inapplicable under similar circumstances, *citing United States v. 1500 Cases*, 249 F.2d 382 (7th Cir. 1957); *S. Schonfeld Co., Inc. v. S.S. Akra Tenaron*, 363 F.Supp. 1220 (D.S.C. 1973); *Bambulas v. United States*, 323 F.Supp. 1271 (D.S.D. 1971).

sovereign immunity must be strictly construed. We reach the same result as does the defendant, although for the somewhat different reasons stated below.

Initially, it must be noted that the statutes cited by the plaintiff, along with the action of the USCS in agreeing to return the seized goods upon payment of a $40,000 fine by Hatzlachh, could make a strong case for the existence of an implied-in-fact contract properly to preserve and redeliver all the goods to Hatzlachh. All other things being equal, such a factual and legal combination might enable plaintiff to prevail.

However, we need not now decide this issue because, unfortunately for plaintiff, all other things in the present case are not equal. This court has previously held that there can exist no contract implied-in-fact unless there is an actual meeting of the minds and a mutual intent to be bound. *See, e.g., Somali Development Bank v. United States,* 508 F.2d 817, 822, 205 Ct.Cl. 741, 751 (1974). Plaintiff here would have us *imply* a promise, or intent to be bound, on the part of the Government similar to the promise implied by the Second Circuit in *Alliance:*

> It is at least as reasonable to imply such a promise here as it is to imply a promise by the government to pay for lands it has tortiously appropriated as was done in *United States v. Dickinson,* 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (alternative holding), and *United States v. Lynah,* 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539.

There are, however, two major obstacles to adopting the rationale of *Alliance.* The first is the obvious factual distinction between the Government's tortious (or non-tortious) seizure of land from the unquestioned, rightful owner [as in *Dickinson*] and the USCS' seizure subject to forfeiture of goods entering the country illegally [as in our present case]. In our view, finding an implied promise to pay in the former set of circumstances certainly would not necessitate finding a similar promise to pay (or return the goods) in the latter.

An even more significant obstacle, however, is encountered in Congress' specific and explicit rejection of any tort liability for "[a]ny claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs." 28 U.S.C. § 2680(c). With this strong, all-inclusive language, the legislative branch of our Government affirmatively recognized the vital importance to the public of unimpeded lawful operations by customs officers and refused to waive sovereign immunity with respect to those functions specified. Notwithstanding the possible interpretation which the *Alliance* court might give to the facts now before us, it appears clear to us that Hatzlachh's claim obviously arose "in respect of . . . the detention of . . . goods or merchandize by [an] . . . officer of customs. . . ."

In a recent decision, this court refused to find an implied-in-fact contract in a situation where Congress had, according to the Supreme Court's interpretation of the Tort Claims Act in *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), restricted a serviceman's recovery for injuries — even those tortiously inflicted — to certain statutorily prescribed procedural and substantive limitations. *Jackson v. United States,* 573 F.2d 1189, 216 Ct.Cl. — (1978). In *Jackson* we cited the Supreme Court's recent decision in *Stencel Aero Eng'r Corp. v. United States,* 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977), which noted that allowing recovery on an implied-in-fact contract would be to "judicially admit at the back door that which has been legislatively turned away at the front door." 431 U.S. at 673, 97 S.Ct. at 2059. We concluded that "Since a soldier cannot circumvent the compensation system by suing in tort for additional money damages for injuries, there is no logical reason to allow him to circumvent the congressionally mandated limitations in a suit that he characterizes as one for breach of contract, which is the case here." *Jackson, supra,* 573 F.2d at 1199, 216 Ct.Cl. at

———.

The exact rationale we employed in *Jackson* gains added strength in the case at hand. Here, Congress has *specifically*

precluded recovery in claims arising from customs detentions, even where such claims arose from tortious actions by the Government. This being the fact, it would certainly be a trespass on congressional prerogatives for this court now to hold that, by seizing subject to forfeiture certain merchandise, the Government *assented* to, or agreed to be bound by, an implied-in-fact contract to return the merchandise whole. Lacking such assent by one of the parties (and here it is doubtful whether either of the parties actually agreed), we cannot find an implied-in-fact contract. *See, e.g., Somali Development Bank v. United States*, 508 F.2d 817, 205 Ct.Cl. 741 (1974). While we may sympathize with the plaintiff for the loss of such a substantial amount of goods, we cannot judicially allow by the back door a claim which was, rather clearly and explicitly, legislatively barred at the front.

But we do not consider the present decision as necessarily controlling a case in which there were additional facts from which an implied or express agreement could possibly arise, *e.g.*, a promise, representation or statement that the goods would be guarded or carefully handled. It is conceivable to us that, in such circumstances, a claim might lie under the Tucker Act even though 28 U.S.C. § 2680(c) might still preclude recovery under the Tort Claims Act.

For the above-stated reasons, after reading all of the submissions in the light most favorable to the plaintff for purposes of plaintiff's opposition to this motion for summary judgment, we hold that Hatzlachh has failed to state a claim based on an implied-in-fact contract[3] and has, therefore, failed to state a claim for which we can grant relief.

Accordingly, after consideration of all the submissions of the parties, and without oral argument, defendant's motion for summary judgment is granted, and plaintiff's petition is dismissed.

[3]Plaintiff's other contentions, as outlined and discussed above, we hold to be equally without merit.

UNITED STATES COURT OF CLAIMS

No. 120-76

[Caption omitted]

MOTION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Plaintiff hereby moves this Court pursuant to Rules 151 and 7 for a review en banc of its decision herein dated July 14, 1978.

The aforesaid decision dismissed plaintiff's petition on the purported ground that it did "not state a claim upon which relief can be granted . . ." (see page 1 of Decision)

Plaintiff not having had oral argument respectfully requests of the Court that it be given an opportunity to orally present its case for the Court's review on the grounds that this case is of singular importance and merits review in view of the Court's holding which basically immunizes and peculiarly sets apart one government department *from most other* governmental departments with respect to governmental accountability and responsibility for its misfeasance.

The issues herein represent a substantial federal question with relation to the liability of the Customs Service for its misfeasance. Additionally, this decision places in doubt the uniformity of prior decisions of the court wherein it excepted just postal bailments from governmental responsibility and none other. Despite the court's tenuous distinction of the facts in the instant case from that of the *Alliance* case it really conflicts head on with the *Alliance* ruling of the Second Circuit.

With respect to the decision of the Court herein, it is respectfully submitted that the Court misapprehended the facts and the applicable law.

The Court misapprehended the fact that the undenied payment and receipt of the $40,000 by Customs Service in consideration of its administrative determination to release and return plaintiff's goods (inasmuch as adequacy of consideration is not for the court to decide) created a new contract whether by novation or modification.

Accordingly, assuming arguendo no contract of bailment is created when Customs Service initially seizes goods, a new contract to deliver palintiff's merchandise is undoubtedly created at the time of the payment of the $40,000. This is a contract like all other contracts which bind the government (e.g., a contract by any government agency to deliver goods to a party).

Secondly, the Court (Decision, pages 6 and 7) mistakenly perceived the Tort Claims Act, 28 U.S.C. § 2680 (c) as an obstacle to a tort recovery and thus further mistakenly felt that allowing a contractual recovery would circumvent the legislative perogative.

The fallacy of this argument is exceedingly obvious. Plaintiff will demonstrate it in a two-fold manner.

The stricture against allowing "by the back door a claim which was, rather clearly and explicitly, legislatively barred at the front" is of no moment here as plaintiff's claim is, so to speak, entering another house altogether.

Plaintiff herein possesses a cause of action which existed apart from and prior to the passage of the Tort Claims Act (i.e., the Tucker Act and its predecessor, the Act of February 24, 1855, 10 Stat. 612). Assuming arguendo that (as we shall see further that it is an erroneous assumption) there ever was a limitation in the congressional grant of power to sue the Customs Service in tort, what bearing can this have on plaintiff's exercise of his remedies via a cause of action that existed prior to the passage of the Tort Claims Act. Any limitation in the Tort Claims Act (assuming there is any) can logically only have bearing on rights that flow from that very Act.

To suggest otherwise would be to infer a congressional intent not to limit but rather to repeal heretofore existing causes of actions, that did not even flow from the Tort Claims Act.

Such an inscrutable suggestion not only flies in the face of all logic and classical rules of statutory construction but is not borne out by the most elementary reading of the Tort Claims Act, 28 U.S.C. § 2860.

The statute specifically reads,

> The provisions of *this chapter* and section 1346(b) of this title shall not apply to . . . (emphasis supplied.)
>
> (c) Any claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs . . . (emphasis supplied.)

It clearly reads that only the "provisions of this chapter shall not apply . . . " (emphasis supplied.)

It clearly pertains only to remedies flowing from this chapter (i.e., the Tort Claims Act) and not remedies flowing from the Tucker Act.

To infer a congressional intent to repeal another prior existing right it would have been incumbent upon the draftsmen of the Tort Claims Act to use the language that "no one may sue for any claims arising in respect of the detention of goods by customs" rather than the statutorily extent language of "The provisions of this chapter . . . shall not apply . . . ." It is obviously only this chapter's provisions and not those of the Tucker Act that are referred to therein.

Assuming a tort was also deemed arising from defendant's acts, plaintiff's right to select and pursue its contract remedies is constitutionally inviolate and cannot be vitiated.

A further glance at the statute will additionally belie the possibility of defendant's proferred interpretation of the statute. For subsections (d) and (e) pertain to patent and admiralty claims against the United States for which the Court of Claims has obviously retained jurisdiction and the

government held liable therefore subsequent to the passage of 28 U.S.C. § 2680.

The limitation obviously only refers to the applicability of this chapter's provisions and does not confer any blanket immunity.

The Tort Claims Act was furthermore clearly never intended to bar claims arising from the negligent loss of goods by the Customs Service but rather to the detention of same by the latter. Why is the Customs Service any different than say the Bureau of Prisons with respect to the latter's responsibility for the safeguarding and return of the personal effects and possessions of prisoners committed to its custody.

Is the government immune from liability when someone is injured in a collision with a government paddy wagon driven negligently by a U.S. Marshall. Is anyone suggesting that the spectre of such liability would impede the zeal of the government in incarcerating those prisoners committed to its custody.

It is about as appropos as to suggest that the imposition of liability for negligence in driving a Washington Post delivery truck would have a "chilling effect" on the constitution's First Amendment.

Plaintiff here is conceding the lack of merit to its claim for $2,000,000 for loss of business, good will, etc. due to the improper seizure. Neither is it suggesting that the government might be liable in the case of an improper seizure for the deterioration and spoilage of goods due to the time span of the government custody. The foregoing might conceivably relate to the exercise of discretionary functions and could arguably impede the same.

Plaintiff herein, however, will insist on compensation for the value of the very goods lost by the Customs Service. Is the Customs Service not up to the task of securing goods of others in its custody? Is the Court's decision a signal to the Customs Service for the abdication of its responsibilities? Does the Customs Service have the arrogant and un-

trammeled right of taking a cavalier attitude with respect to the custody of other peoples' previous and valuable goods. The Court's decision seems to imply such.

Cold logic can only sustain the *Alliance* Court's interpretation of the limitation set forth in the Tucker Act as pertaining only to claims arising from detention of goods as opposed to the negligent loss of goods.

As the *Alliance* Court said at 252 F2d 534,

> The probable purpose of the exception was to prohibit actions for conversion arising from a denial by the customs authorities or other law enforcement agencies of another's immediate right of dominion or control over goods in the possession of the authorities . . . (emphasis supplied.)

Stated succinctly, one is relegated by this limitation to travel the traditional mandamus route in seeking the return of goods held unreasonably by the Customs Service and cannot sue for conversion under the Tort Claims Act.

The correctness of this interpretation is further inescapably demonstrated by the *Alliance* Court at 252 F.2d 534 in finding that,

> That the exception does not and was not intended to bar actions based on the negligent destruction, injury or loss of goods in the possession or control of the customs authorities is best illustrated by the fact that the exception immediately preceding it expressly bars actions "arising out of the loss, miscarriage or negligent transmission" of mail, 28 U.S.C. § 2680(b). If Congress had similarly wished to bar actions based on the negligent loss of goods which governmental agencies other than the postal system undertook to handle, the exception in 28 U.S.C. § 2680(b) shows that it would have been equal to the task.

In other words, the Tort Claims Act's exception in 28 U.S.C. § 2680(c) could equally have been phrased in terms

of "any claim arising in respect of . . . negligent loss or destruction of any goods . . .".

Accordingly, the *Alliance* Court at 252 F.2d 534 concludes,

> The conclusion is inescapable that it did not choose to bestow upon all such agencies general absolution from carelessness in handling property belonging to others.

A careful scrutiny of the limited legislative history on point further vindicates the Alliance Court's conclusions in that the limitation of 28 U.S.C. § 2680(c) was specifically intended to deprive one of suits in conversion where mandamus is equally available.

Report No. 1287 of the House of Representatives, 79th Congress, 1st Session, entitled "Tort Claims Against The United States" (page 2) indicates that the obvious intent of the statute was to deprive the government of immunity.

> As a result . . . the Government is subject to suit in contract, on admiralty and maritime torts and for patent infringement. On the other hand, no action may be maintained against the government in respect to any common law tort. *The existing exemption in respect to common law tort appears incongrous. Its only justification seems to be historical* . . . (emphasis supplied.)

The House Report (at page 6) actually reveals that some of the exceptions in the statute were not intended by the draftsmen to buttress sovereign immunity but relegate claimants to traditional remedies.

> The other exemptions in section 402 relate to certain governmental activities which should be free from the threat of damage suits *or for which adequate remedies are already available* (emphasis supplied.)

As already indicated, there being no sound reason why the Customs Service should be absolved for all ministerial

misfeasance (especially as plaintiff's claim is being limited to the value of the goods directly lost by the Customs Service) the latter explanation in the House Report, *supra* is the key.

In the case of detention of goods the draftsmen were precluding a remedy sounding in conversion as "adequate remedies are already available", i.e., mandamus.

The blanket exemptions in the case of the loss of mail by the Postal Service and the class of wilful torts were only intended to leave unimpeded the *discretionary activities* of government officials.

As the Report (*supra*) at page 6 states,

> The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. Nor is it desirable or intended that the constitutionality of legislation, or the *legality of a rule or regulation should be tested* through the medium of a damage suit for tort (emphasis supplied.)

The foregoing basically conforms to the Senate Report No. 1400, 79th Cong., 2d Session, which also indicates that it is not intended that all the enumerated categories be granted blanket immunity but that multiplicity of remedies be avoided in cases for which adequate remedies are already available.

Accordingly, the conclusion must be sustained that the Tort Claims Act allows a tort cause of action against customs to be founded upon it and in any event certainly does not repeal a cause of action in contract founded on a prior act.

The last matter that plaintiff addresses itself to is the Court's tenuous and erroneous distinction between "the Government's . . . seizure of land from the rightful owner [as in Dickinson] and the U.S.C.'s seizure subject to for-

feiture of goods entering the country illegally as in our present case." (Decision, page 6)

The suggestion that an *ex parte* decision by the Customs Service officials to seize goods for an alleged violation (plaintiff is not conceding the violation which is academic, in any event) can strip plaintiff of his ownership and title to the goods, is beyond all bounds of established law, reason and equity.

It is akin to saying that the family of one arrested for murder has no wrongful death remedy for medical malpractice occurring in a prison infirmary because a police officer's arrest constitutes a tribunal finding and judicial disposition and death warrant.

It cannot be overstated that a naked seizure is not a disposition on the merits (nor a disposition at all).

And as plaintiff was the rightful owner of the subject goods, that presumption of ownership continued until there was a judicial or quasi judicial fact-finding to the contrary. As the Customs Service came to an agreement with plaintiff for release of the seizure, that judicial fact finding disposition was never had. As such a judicial disposition never came to pass, the presumption of plaintiff's ownership and title to the goods never ceased and continues to date.

Consequently, the Court's proferred distinction between the situation herein and that of *Alliance* and *Dickinson* is thus vitiated.

As a matter of fact the following cited quotation from the Treasury Department's own rules T.D. 77-148 (Federal Register 5/31/77) will conclusively (though gratuitously) show that a Customs Service seizure does not effect title or ownership but is rather a security device for the sole benefit of the Customs Service.

T.D. 77-148 reads

> Treasury Decision 77-136 amended § 162.41(a) of Customs Regulations (19 CFR 162.41(a)) to provide for certain situations in which merchandise shall, or shall not, be seized. *§ 162.41(a)(3) was amended to provide that merchandise shall only be seized* if the District Director is satisfied that (1) the *violator appears to be insolvent* or may soon become insolvent, (2) the violator or his assets appear to be beyond the jurisdiction of the United States or (3) for some other reasons a claim for the domestic value of the merchandise would not protect the revenue (emphasis supplied.)

The aforesaid Treasury Department Decisions limiting the Customs Service's seizure perogatives to those situations that give rise to insecurity is a clear and convincing mandate of government and statutory intent that a seizure has no effect on ownership but merely affords the Customs Service with financial security pending full disposition of the alleged violation.

Accordingly, the relevant facts herein are precisely like those of *Alliance* and *Dickinson*.

Accordingly, as plaintiff is conceding that lack of merit on the $2,000,000 claim due to the arbitrariness of the seizure, and neither is it seeking damages for any kind of spoilage and deterioration of the goods during the Customs Service custody, but is merely seeking the actual value of the goods directly lost by the Customs Service, no spectre of an impediment to the untrammeled exercise of the Custom Service's discretion can be suggested. In no way does this claim differ from that of *Alliance*.

Additionally, it is respectfully submitted that the opening statement in defendant's brief that plaintiff's goods were seized for "violation" of Customs Service laws and for attemption "to introduce into the commerce of the United States merchandise by means of false statements" without qualification as an "alleged violation" can only be perceived as an *ad hominem* attack on plaintiff designed to obscure the real culpability of the Customs Service in the high handedness of its seizure and its misfeasance in securing plaintiff's goods.

As academic as it may seem, the facts herein involved a mere clerical error by a custom's broker regarding goods that were only being brought into the Foreign Trade Zone and were not intended to be "introduced into the commerce of the United States", an error which could not have effected a deprivation of tariff revenue (as there were none owing).

Of course, *ad hominem* arguments have no place in proper legal discourse especially when they are as irrelevant as herein.

What is of significant moment is that crediting any of defendant's arguments would in effect entail that Customs "can do no wrong".

It would in effect signal the Customs Service to go on leaving goods open and unsecured on the docks without accountability. It would leave legitimate claimants totally without remedy or legal recourse. It would be a regression to feudal justice not in keeping with enlightened and modern notions of government.

Accordingly, for the foregoing reasons the Court is respectfully urged to allow for oral argument and consider a rehearing of its decision with a view towards denying defendant's motion for summary judgment.

Respectfully submitted,

MARK LANDESMAN
Attorney for Plaintiff.

UNITED STATES COURT OF CLAIMS

No. 120-76

[Caption omitted]

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR REHEARING

Defendant agrees with plaintiff's statement that this Court's decision "conflicts head on with the *Alliance* ruling of the Second Circuit." (P. Reh. Br., p. 1.) As defendant pointed out in its briefs, however, the *Alliance* decision was clearly erroneous.

Plaintiff's argument (*Id.* p. 2) that a "new"contract to deliver the merchandise was created at the time of payment of the $40,000 fine was presented to the Court (in a half-hearted way) on page 29 of its brief filed February 21, 1978. While defendant deemed the argument then "so devoid of merit as to be unworthy of a response" (Deft's Reply Br., filed March 31, 1978 at p. 18), the Court did indicate (Slip Op., p. 5) that "all other things being equal," plaintiff could make a strong case for recovery on such theory. Defendant disagrees. In any event, the Court found (Slip Op., p. 6) that "all other things in the present case are not equal," since the required elements of an actual meeting of the minds and mutual intent to be bound were lacking. This is correct.

Plaintiff would reject the Court's argument that to allow recovery on a contract theory when Congress expressly retained sovereign immunity to such claims by enacting 28 U.S.C. § 2080(c) would be to permit access by the back door despite the fact that the front door had been locked by Congress. Plaintiff states that he is trying to enter "another house altogether" (P. Reh. Br., p. 2). Plaintiff is wrong. It is still trying to get into the Treasury, by whatever theory it can. The "back door" argument is a valid means of interpreting the intent of Congress as to whether sovereign

immunity has been waived, as recognized by the Supreme Court in *Stencel Aero Eng'r Corp.* v. *United States*, 431 U.S. 666 (1977) and by this Court in *Jackson* v. *United States*, 216 Ct. Cl. ____, 573 F.2d 1189 (1978), both of which were relied upon by the Court in its decision in the instant case. Plaintiff has shown no basis to overturn the Court's reliance on the *Stencel Aero* rationale.

Plaintiff's arguments based on *Alliance* (Reh. Br., pp. 6-9) were fully considered and rejected by the Court. They appear no stronger as reformulated by plaintiff now. The only new material is the quotation from the House Report No. 1287 on the Tort Claims Act. The languge from page 6 of the Report quoted by plaintiff supports defendant:

> *The other exemptions in Section 402 relate to certain governmental activities which should be free from the threat of damage suits* or for which adequate remedies are already available.
>
> (Emphasis added.)

Plaintiff emphasized the last clause, but the portion [italicized] above is stated in the disjunctive and fully supports the following statement at page 22 of the Government's moving brief herein:

> Unless a remedy in tort has been provided, it is essential to the proper implementaton of the police powers of the sovereign that the Customs be free from suits seeking damages for implementation of the laws regarding seizures and forfeitures.

The basic flaw in plaintiff's argument that the "detention" exception to the Tort Claims Act was not intended to "repeal a cause of action in contract founded on a prior act" [*i.e.*, the Tucker Act] is that the Tucker Act never did authorize suit on contract implied in law, *Merritt* v. *United States*, 267 U.S. 338 (1925), as this sort of "implied bailment contract" most surely is.

Plaintiff complains (P. Reh. Br., pp. 10-12) about the Court's distinguishing *United States v. Dickinson*, 331 U.S. 745 (1945), on the grounds that while an "implied contract" might be inferred under the *Dickinson* facts one would not necessarily be inferred where the property entered the county illegally, "as in our present case." (Slip Op., p. 6.) Plaintiff correctly points out (P. Reh. Br., p. 10-11) that there has never been a *judicial* determination that its goods were properly subject to forfeiture (plaintiff mooted he issue by paying a fine and having the forfeiture remitted). Nevertheless the Court's rejection of the Second Circuit's analysis of *Dickinson* was correct since, as defendant pointed out in its prior briefs, the Supreme Court's later decisions such as *United States* v. *Causby*, 328 U.S. 256 (1946), cast doubt on the "implied contract" rationale of some early "taking" cases. In any event, the United States never "took" any property in the instant case — it was stolen by persons unknown — so the *Dickinson* "implied contract" ratonale is not for application even if it were correct, which it is not. Therefore, while the Court may have distinguished *Dickinson* for the wrong reason, it correctly concluded that *Alliance* was wrong in finding a contract implied in fact to protect or pay for goods lost or stolen while under detention by Customs.

Plaintiff's final argument, that defendant made an *ad hominem* attack on plaintiff, is without merit. Defendant has always made it clear that plaintiff was determined *by Customs* to have violated the customs laws, which is undeniably true. Moreover, in the interest of fairness and completeness, defendant attached as exhibits to its moving brief the self-serving letters from plaintiff to Customs defending against the charge of violation of such laws. It is therefore emphatically denied that defendant made any improper *ad hominem* arguments at all, much less any improper arguments which would justify rehearing.

CONCLUSION

For the foregoing reasons, plaintiff's arguments in support of its motion for rehearing have either already been

fully considered and properly rejected by the Court in its initial decision or are utterly devoid of merit. Accordingly, the motion for rehearing should be denied.

Respectfully submitted,

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No. 78-1175

In the Supreme Court of the United States

OCTOBER TERM, 1978

HATZLACHH SUPPLY COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-8a) is reported at 579 F. 2d 617.

JURISDICTION

The opinion and judgment were entered on July 14, 1978. A timely petition for rehearing was denied on September 29, 1978 (Pet. App. 9a). The Chief Justice extended the time for filing a petition for certiorari to January 27, 1979 (Pet. App. 10a). The petition was filed on January 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the United States may be held liable for breach of an implied bailment contract when goods are lost while detained by the United States Customs Service following their seizure for customs violations.

STATEMENT

Petitioner imported certain camera supplies and miscellaneous items from Germany in 1970. This merchandise was seized and declared forfeited to the United States by the Customs Service on its arrival at the port in New Jersey. This action was taken because customs officials discovered a discrepancy between the descriptions of the merchandise submitted on arrival and the items in fact landed (Pet. App. 2a). Petitioner applied for return of the seized items,[1] and Customs officials agreed to return the goods to petitioner after payment of a $40,000 penalty. The penalty was paid, but when the merchandise was returned to petitioner certain items were missing.

On March 17, 1976, approximately six years after the goods were landed, petitioner filed this suit in the Court of Claims seeking to recover $165,220.50, which it alleged to be the value of the goods "pilfered" or "stolen" while in the custody of the Customs Service[2] (Pet. App. 2a). The government moved for summary judgment, alleging that the complaint failed to state a claim within the jurisdiction of the court (Pet. App. 2a). The Court of Claims granted the motion, holding that petitioner had not stated a claim for breach of an implied bailment contract, and therefore had failed to state a claim on which the court could grant relief (Pet. App. 8a).

The court concluded that because the Federal Tort Claims Act, 28 U.S.C. 2680(c), bars "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs" (Pet. App. 4a),

[1]See 19 U.S.C. 1618; 19 C.F.R. 171.11-171.13.

[2]Petitioner also sought to recover $2,000,000 for loss of "face and good will" (Pet. App. 2a). This claim was denied and is not in issue here.

and thus precludes recovery on claims arising from tortious actions by government agents in the course of customs detentions, it would be "a trespass on congressional prerogatives * * * to hold that, by seizing subject to forfeiture certain merchandise, the Government *assented* to, or agreed to be bound by, an implied-in-fact contract to return the merchandise whole" (Pet. App. 7a; emphasis in original). Because of this express disclaimer of liability by the government, the court reasoned that it could not find an implied agreement by the government to pay for the value of petitioner's missing merchandise (Pet. App. 7a).[3] The court indicated, however, that it would not consider its decision "as necessarily controlling a case in which there were additional facts from which an implied or express agreement could possibly arise, *e.g.* a promise, representation or statement that the goods would be guarded or carefully handled" (Pet. App. 8a). In the latter circumstances, the court indicated, a claim might lie under the Tucker Act even though 28 U.S.C. 2680(c) precluded recovery under the Federal Tort Claims Act (*ibid.*).

ARGUMENT

The decision of the Court of Claims is correct, and there is no need for further review.

Persons seeking recovery from the United States for damages allegedly done them ordinarily must rely on one of two bases of liability—tort or contract. The first is governed by the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*; the second usually is governed by the Tucker Act, 28 U.S.C. 1346(a). Petitioner's attempt to recover under a tort theory

[3]The court cited its previous decision in *Somali Development Bank* v. *United States*, 508 F. 2d 817, 822 (1974), where it had noted that there can exist no contract implied-in-fact unless there is an actual "meeting of the minds" and a mutual intent to be bound.

would be doomed by 28 U.S.C. 2680(c), which bars recovery on account of "[a]ny claim arising in respect of * * * the detention of any goods or merchandise by any officer of customs * * *." Petitioner apparently recognizes that it cannot recover in tort,[4] and it accordingly seeks to recover under a theory of contract the value of the part of its shipment that disappeared while being detained by customs officials.

The problem with petitioner's contract theory is that it never entered into a contract with the government. There was no written document of any sort and no oral agreement. Petitioner therefore argues that a contract of safe bailment should be implied and then made the basis of liability.

This is a difficult argument for petitioner to make. The goods in question came into the hands of the Customs Service on their importation into the country; they came into federal custody not as a result of any negotiations or agreement but rather as a matter of federal law. Customs officials then retained custody because the documents under which the importation was made falsely described the merchandise. In light of this misdescription, the United States became entitled to the goods; they were forfeit. See 19 U.S.C. 1618; *United States* v. *Stowell*, 133 U.S. 1, 16-17 (1890). Consequently, the goods then were held not for the benefit of petitioner but for the benefit of the United States. They were not the subject of any "implied" promise of bailment. In this sequence of events there was no mutual exchange of promises, no consideration, none of the things that ordinarily mark the creation of a contract.

Indeed, the "implication" of a bailment contract concerning the detention of goods by customs officials

[4]If only because the statute of limitations on tort claims expired before it filed this suit.

would simply be a backhanded way of deciding to disregard the principle of 28 U.S.C. 2680(c): that the United States is not liable for "any" errors occurring "in respect of" detentions of goods on importation. Section 2680(c) would not preclude recovery if there were a genuine contract of bailment, because the Tort Claims Act does not purport to modify the Tucker Act. But Section 2680(c) surely precludes petitioner's effort to turn a tort into a contract suit by the invention of a fictitious "implied" contract of bailment. The Court of Claims agreed with this reasoning, and we rely on its opinion (Pet. App. 3a-7a).

It is true, as petitioner points out, that *Alliance Assurance Co.* v. *United States*, 252 F. 2d 529 (2d Cir. 1958), held that Section 2680(c) does not bar an award of damages for the loss of merchandise during the process of customs inspection. The court reasoned that a contract of bailment must be implied because the government had obtained possession of another's goods for the government's benefit; the court also thought that Section 2680(c) applied only in cases of illegal detention and not in cases of proper detention negligently carried out. The Court of Claims here explicitly refused to follow *Alliance* (Pet. App. 6a-7a), thus joining many other courts that have distinguished or rejected the reasoning of that case. See, *e.g.*, *Walker* v. *United States*, 438 F. Supp. 251, 258-259 (S.D. Ga. 1977); *S. Schonfeld Co.* v. *SS Akra Tenaron*, 363 F. Supp. 1220, 1223 (D. S.C. 1973); *United States* v. *Articles of Food*, 67 F.R.D. 419, 425 (D. Idaho 1975).[5] See also *United States* v. *One (1) 1972 Wood*,

[5]*Alliance* was cited with apparent approval in *A-Mark, Inc.* v. *United States Secret Service*, No. 77-2152 (9th Cir. Nov. 13, 1978), but that case did not involve the detention of goods by customs officers. The case does, however, appear to follow *Alliance* in restricting Section 2680(c) to claims arising out of illegal detention, thus allowing tort recoveries for damages sustained during an otherwise-proper detention. See *United States* v. *Lockheed L-188 Aircraft*, No. 77-1131 (9th Cir. Feb. 15, 1979), slip op. 537 n.16.

19 Ft. Custom Boat, 501 F. 2d 1327, 1330 (5th Cir. 1974).

The rule of *Alliance* produces an astonishing result: if the government wrongfully seizes property and then loses it, the owner has no recovery; if the government properly seizes chattels because they are subject to forfeiture and then loses them, the owner (whose false documents projected the chattels into the government's custody) can recover. It is unlikely that Congress intended to create such a topsy-turvey rule.

The legislative history supports our submission, for it shows that Congress intended "to prohibit actions in conversion" arising from detention of goods. See S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946), which states that Sections 2680(b) and (c) exempt from recovery

> claims which relate to certain governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available. These exemptions cover claims arising out of the loss or miscarriage of postal matter; the assessment or collection of taxes or assessments; the detention of goods by customs officers * * *.

See also *Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 44 (1942); Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 Geo. L.J. 1, 45 (1946). What petitioner seeks, and what *Alliance* allowed, is an "action in conversion" of the detained goods, and that is precisely what the statute forbids.

Although we therefore conclude that *Alliance* is wrong,[6] the principles of that case apparently would

[6] *A-Mark, Inc.* v. *United States Secret Service, supra*, also is incorrectly decided to the extent it adopts the reasoning of *Alliance*.

permit petitioner to seek recovery here despite the differences between the cases. It would be immaterial, under the analysis of *Alliance*, that the goods involved in this case were seized and held for forfeiture, while the goods involved in *Alliance* itself apparently were properly entered.[7] The other technical distinction between the cases—in *Alliance* the Customs Service had furnished "tickets" to the importer so that it could claim its goods, while here there were none—also would play little role in the analysis.

It is possible, however, that the Second Circuit would retreat from the broadest possible reading of *Alliance* in a case such as the present one. *Alliance* did not involve goods seized for forfeiture, and the government's special interest in such goods would call for different treatment despite the broad language of *Alliance*. A bailment cannot be implied for forfeited goods—even if it may be implied for other goods—because the goods subject to forfeiture are no longer being held for the importer's benefit. See *Walker* v. *United States, supra*, 438 F. Supp. at 258. It remains to be seen how the Second Circuit would treat a case such as the present one. This, coupled with the fact that situations such as the present do not arise frequently, leads us to submit that the petition for certiorari should be denied despite the conflict in the rationales used by the Court of Claims and the Second Circuit.

[7] The *Alliance* opinion apparently would treat the seizure for forfeiture simply as a reason why the goods properly were in the government's possession. It would then permit the importer, having obtained a remission of the forfeiture and having paid the penalty, to show that the goods thereafter were treated wrongfully.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1979

DOJ-1979-04

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1175

HATZLACHH SUPPLY COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

1. We note initially that the government concedes here, as it did on rehearing in the Court of Claims, that there is a square conflict between the decision of the Court of Claims and the decision of the Court of Appeals for the Second Circuit in *Alliance Assurance Co. v. United States,* 252 F.2d 529 (2d Cir. 1958). Brief in Opp. pp. 5, 6 and 7.[1] In addition, the Court of Claims' reasoning conflicts with another appellate decision issued within the past few months on the question whether the United States may be sued for damages to detained goods — *A-Mark, Inc. v. United States Secret Service,* No. 77-2152 (9th Cir. Nov. 13, 1978).[2]

[1]The government acknowledges that the small factual differences between the cases would not justify a different result. *Compare* Petition p.5 n.2, *with* Brief in Opp. p.7 n.7.

[2]Because the opinion of the Court of Appeals for the Ninth Circuit has not yet been published, it is reproduced in Petitioner's Appendix E, hereto.

In *A-Mark* the Ninth Circuit has chosen to follow the Second Circuit's decision in *Alliance*.[3]

2. The primary conflict relates to the Court of Claims' reading of an exclusion in the Tort Claims Act, 28 U.S.C. §2680(c) that bars suits "arising in respect of . . . the detention of any goods or merchandise." The court below held that not only are tort suits for alleged illegal detention barred, but also there may be no recovery for loss or other harm to goods. The Court of Claims' reading totally absolves the government of liability for carelessness in handling the property of others in its possession.

The Second and Ninth Circuits in *Alliance* and *A-Mark* did not read the exclusion of liability so sweepingly. Since the preceding section of the Tort Claims Act, 28 U.S.C. §2680(b), expressly bars suits "arising out of the *loss*, miscarriage or negligent transmission" of mail (emphasis added), it is reasonable to assume that, if Congress had wished similarly to bar actions for loss of goods by officials other than Postal Service employees, it could have done so by including the word "loss" in Section 2680(c). The Second and Ninth Circuits concluded that the language of Section 2680(c) was designed only to prevent lawsuits challenging the legality of a detention (*Alliance*, 252 F.2d at 534 (Pet. App. 18a-19a), quoted in *A-Mark* at App. E, 2a-3a):

[3]The government cites four cases which, it says, "have distinguished or rejected" the reasoning of *Alliance*. Of the four, only one — *S. Schonfeld v. SS Akra Tenaron*, 363 F. Supp. 1220, 1223 (D.S.C. 1973) — reached the question whether the United States can be sued for loss or other harm caused to detained property. Two others, *United States v. Articles of Food*, 67 F.R.D. 419, 425 (D. Idaho 1975), and *United States v. One (1) 1972 Wood, 19 Ft. Custom Boat*, 501 F.2d 1327, 1330 (5th Cir. 1974), were for damages resulting from the detention itself, not the handling or subsequent loss of the goods. The remaining case, *Walker v. United States*, 438 F Supp. 251, 258 (S.D.Ga. 1977), held that there was no recovery on an implied contract because no bailment had been created on the facts of that case. Hence, there is only one district court which follows the view of the Court of Claims and two appellate courts which disagree.

> The probable purpose of the exception was to prohibit actions for conversion arising from a denial by the customs authorities or other law enforcement agencies of another's immediate right of dominion or control over goods in the possession of the authorities... [T]he exception does not and was not intended to bar actions based on the negligent destruction, injury or loss of goods in the possession or control of the customs authorities . . . .

Thus both courts held that agencies other than the Postal Service may be sued if they are responsible for injury or loss to detained goods.[4]

3. The Court of Claims reached a second issue not considered in *A-Mark* when it held that Section 2680(c) bars not only tort suits, but also contract suits on the same facts, because to do otherwise would be to "trespass on congressional prerogatives." Pet. App. 5a. Obviously, the Second Circuit held otherwise in *Alliance*, and its conclusion is plainly correct. Section 2680, by its own terms, applies *only* to tort actions and not to contract claims.[5]

[4]The government errs when it says (Brief in Opp. p.6):

> The rule of *Alliance* produces an astonishing result: if the government wrongfully seizes property and then loses it, the owner has no recovery; if the government properly seizes chattels because they are subject to forfeiture and then loses them, the owner . . . can recover.

In fact, *Alliance* and *A-Mark* would permit a suit for damage or loss to detained goods irrespective of the justification for the initial detention.

[5]The list of exceptions contained in Section 2680 is introduced as follows: "The provisions of this chapter and section 1346(b) of this title shall not apply to . . . ." "This chapter" refers to the Tort Claims Act. Section 1346(b) provides jurisdiction in the district courts for actions based upon "the negligent or wrongful act or omission" of a federal employee, while Section 1346(a), — not covered by the Section 2680 exceptions — provides jurisdiction in the district courts for actions not exceeding $10,000 and "not sounding in tort."

Moreover, the government concedes that "the Tort Claims Act does not purport to modify the Tucker Act." Brief in Opp. p.5. Hence, an exception to the Tort Claims Act cannot be read to deny redress to an individual for a legitimate contract claim.

The Court of Claims agreed that the applicable statutes and regulations, as well as the government's agreement to return the goods upon payment of the fine, "make a strong case for the existence of an implied-in-fact contract properly to preserve and redeliver the goods . . . ."[6] Pet. App. 5a. In its Brief in Opposition, the government has admitted that there was an agreement to return the goods upon payment of the requested amount. Brief in Opp. p.2. Thus there was a valid contract claim.

4. The only reasons offered by the government for leaving this conflict unresolved are the "possibility" that "the Second Circuit would retreat" from the *Alliance* holding and the government's assertion that "situations such as the present [sic] do not arise frequently . . . ." Brief in Opp. p. 7. In view of the Ninth Circuit's concurrence in the result and rationale of *Alliance*, the government's hope that the conflict will disappear seems plainly unjustified.[7] Moreover,

[6]The Court specifically noted the language of 28 U.S.C. §2465:

> Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant . . . .

[7]Although the government contends that *A-Mark* is "incorrectly decided" (Brief in Opp. p.6 n.6), it is evidently content to let stand *A-Mark's* holding that individuals like this petitioner may sue the United States for recovery of damages to detained goods. We have been informed by the Clerk of the Court of Appeals for the Ninth Circuit that the government requested and was granted an extension of time in which to file a petition for rehearing in *A-Mark*, but did not file such a petition. The government should not be permitted to acquiesce in *A-Mark* while, at the same time, denying recovery to petitioner and seeking to sustain the decision below on the ground that it was correctly decided.

the addition of the Ninth Circuit to the conflict among courts pits the Court of Claims, with jurisdiction over contract claims upon the government, against the federal appellate courts on both coasts which have jurisdiction over major import centers responsible for over one-third of the goods imported into this country.[8] This conflict presents a grave risk of unfair and inconsistent judgment on indentical facts. The result below is, in addition, fundamentally wrong. If government employees carelessly lose or damage detained goods, the United States should not be absolved from liability without the clearest indication that this is the Congress' judgment.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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[8]*See*, U.S. Department of Commerce, Highlights of U.S. Export and Import Trade, pp. 128-129 (1978).

APPENDIX

APPENDIX E

A-MARK, INC., Plaintiff-Appellant,
v.
UNITED STATES SECRET SERVICE DEPARTMENT OF the TREASURY, Defendant-Appellee.

No. 77-2152

United States Court of Appeals, Ninth Circuit.

Nov. 13, 1978

On Appeal from the United States District Court for the Central District of California.

Before MERRILL, GOODWIN and TANG, Circuit Judges.

PER CURIAM:

This appeal has been taken from an order dismissing the action for lack of subject-matter jurisdiction.

Appellant seeks recovery from the United States under the Tort Claims Act for negligent damage to a rare silver dollar entrusted by appellant to Treasury officials in May, 1971, for authentication as to its genuineness. Appellant alleged that the coin, when given to the government officers was numismatically rated as "brilliant, uncirculated and semiprooflike"; that while in the possession of the government it was severely damaged, resulting in a loss of value in the sum of $29,000.

In August, 1971, a technical consultant to the Director of the Mint examined the coin and gave his opinion that the coin was genuine but that the "S" mint mark was counterfeit. Because of this finding the coin was detained by the United States Secret Service pending investigation into possible fraudulent alteration, mutilation or falsification in violation of 18 U.S.C. § 311. Upon completion of the

investigation, the coin was returned to appellant. This action was brought April 14, 1974.

28 U.S.C. § 2680(c) provides that the Tort Claims Act shall not apply to "Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer."

The district court concluded that because the alleged damage to the coin occurred after the Secret Service had opened its investigation and during the period of detention of the coin, it has arisen "in respect of" its detention and the exception of § 2680(c) applied. Accordingly the action was dismissed. This appeal followed.

Appellant contends that the exception reaches only those claims asserting injury as a result of the fact of detention itself where the propriety of the detention is at issue, and does not reach claims where the injury is asserted to result from negligent handling of property in the course of detention. We agree. Such was the holding in *Alliance Assurance Company v. United States*, 252 F.2d 529 (2d Cir. 1958). There imported goods were taken into possession by Customs officials for purposes of appraisal. They mysteriously disappeared and the plaintiff sued for their value. The court rejected the government's contention that the claim was barred by § 2680(c), stating:

> "The probable purpose of the exception was to prohibit actions for conversion arising from a denial by the customs authorities or other law enforcement agencies of another's immediate right of dominion or control over goods in the possession of the authorities. An examination of the cases in which the exception was asserted reveals that it is normally used to bar actions based upon the illegal seizure of goods. See, e. g., *Jones v. Federal Bureau of Investigation*, D.C., 139 F. Supp. 38, 39; *United States v. One 1951 Cadillac Coupe De Ville*, D.C., 125 F. Supp. 661. That the exception does not and was not intended to bar actions based on the negligent destruction, injury or loss of goods in the possession or control of the customs authorities is best illustrated by the fact that the exception immediately preceding it expressly bars actions 'arising out of the loss, miscarriage, or negligent transmission' of mail. 28 U.S.C.A. § 2680(b). If Congress had similarly wished to bar actions based on the negligent loss of goods which governmental agencies other than the postal system undertook to handle, the exception in 28 U.S.C.A. § 2680(b) shows that it would have been equal to the task. The conclusion is inescapable that it did not choose to bestow upon all such agencies general absolution from carelessness in handling property belonging to others."

252 F.2d at 534. We agree.[1]

Reversed and remanded for further proceedings.

TANG, Circuit Judge, concurring:

I concur in the result. The majority, following the reasoning of *Alliance Assurance Co. v. United States*, 252 F.2d 529 (2nd Cir. 1958), holds that 28 U.S.C. § 2680(c) excludes only damages arising from the fact of detention itself, not damages due to negligent handling during detention. In my view, a better rationale is to read § 2680(c) as covering only those detentions which occur within the context of customs and tax activities. The governmental function of assessing and collecting customs duties necessarily requires some period of detention when the imported item is inspected for purposes of evaluation. A similar situation

[1] We note that two court of appeals cases holding the section to provide an exemption are distinguishable. *Morris v. United States*, 521 F.2d 872 (9th Cir. 1972), was based not on the detention clause but on the clause relating to assessment and collection of taxes. *United States v. 1500 Cases, More or Less, etc.*, 249 F.2d 382 (7th Cir. 1957), was addressed only to the question whether the detention was wrongful.

often arises when property must be levied against for tax purposes. It follows that where the ultimate act of assessing the tax or duty is rendered exempt, the incidental activity of detention must also be protected. §2680(c) contains parallel clauses which cover "the assessment or collection of *any tax or customs duty*, or the detention of any goods or merchandise by *any officer of customs or excise* or any other law-enforcement officer." (emphasis added). The clauses both dwell exclusively on customs and taxes, except for the final reference to other law-enforcement officers. The "any other law-enforcement officer" phrase should be viewed as Congress' recognition of the fact that federal officers, other than customs and excise officers, sometimes become involved in the activity of detaining goods for tax or customs purposes.

This reading is supported by what little legislative history there is on § 2680(c). The Senate Report to the Legislative Reorganization Act of 1946 had only the following to say about the tort claim exceptions:

> This section specifies types of claim which would not be covered by the title. They include . . . claims which relate to certain governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available. These exemptions cover claims arising out of the loss or miscarriage of postal matter; the assessment or collection of taxes or assessments; the detention of goods by customs officers...

S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946). *See also Hearings Before House Committee on the Juridicary on H.R. 5373 and H.R. 6463*, 77th Cong. 2d Sess. 44 (1942); Gottlieb, *The Federal Torts Claims Act—A Statutory Interpretation*, 35 Geo. L. Rev. 1, 45 (1946).

It is noteworthy that the report speaks of the detention of goods only by customs officers. If Congress had intended

the exception to extend to detentions by "any law-enforcement officer" outside the area of tax or customs, one would expect a more encompassing explanation.

It is true that the few cases on point have applied §2680(c) to law-enforcement officials other than customs and tax officials. *See, e. g., United States v. 1500 Cases, More or Less, etc.*, 249 F.2d 382 (7th Cir. 1957) (FDA); *United States v. Articles of Food etc.*, 67 F.R.D. 419 (D.Idaho 1975) (same); *Van Buskirk v. United States*, 206 F. Supp. 553 (E.D. Tenn. 1962) (FBI); *Jones v. Federal Bureau of Investigation*, 139 F.Supp. 38 (D.Md 1956). All of these cases, however, relied on language in *Chambers v. United States*, 107 F.Supp 601 (D. Kan. 1952), which was clearly dictum. None of them discuss the legislative history of the statute and only one addresses the issue, and that in dictum. *Van Buskirk v. United States, supra*, 206 F. Supp. at 556. It is submitted that they are wrongly decided and that §2680(c) should be limited to detentions of goods by law-enforcement officers acting in a customs or tax capacity.

Under such an analysis, the detention of the coin here was not for a customs or tax purpose and §2680(c) exception would be inapplicable.

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October Term 1979

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v.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR PETITIONER

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INDEX

Page

TABLE OF AUTHORITIES

Cases:

Page

Page

Page

Statutes:

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Claims (App., pp. 25a-32a)[1] is reported at 579 F.2d 617.

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[1] "App." refers to the Appendix filed with this Brief.

JURISDICTION

The opinion and judgment of the Court of Claims were entered on July 14, 1978. On September 29, 1978, the Court of Claims denied a timely petition for rehearing (Pet. App., p. 9a).[2] On December 8, 1978, Mr. Chief Justice Burger extended the time for filing a petition for a writ of certiorari to and including January 27, 1979 (Pet. App., p. 10a). The petition was filed on January 26, 1979, and was granted on May 14, 1979. 99 S.Ct. 2158. The jurisdiction of this Court rests upon 28 U.S.C. § 1255(1).

QUESTION PRESENTED

Whether the United States may be held liable for breach of an implied contract of bailment when goods seized from an importer by the United States Customs Service are lost while in the temporary custody of the Customs Service.

STATUTORY PROVISIONS INVOLVED

The Tucker Act provides, in relevant part, as follows:

28 U.S.C. § 1491:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

[2] "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari filed in this case.

The Federal Tort Claims Act provides, in relevant part, as follows:

28 U.S.C. § 1346(b):

> Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2680:

> The provisions of this chapter and section 1346(b) of this title shall not apply to –
>
> * * *
>
> (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
>
> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.
>
> * * *

STATEMENT

Petitioner imported camera supplies and other items from Germany valued at approximately $577,000. Upon the arrival of some of these goods in New Jersey, a routine inspection showed a discrepancy between the merchandise description on the delivery application and the invoices for

the goods. Taking action which the court below described as "perhaps of questionable severity" (App., p.26a), the United States Customs Service seized the goods and declared them "subject to forfeiture" pursuant to 19 U.S.C. § 1592.[3]

Petitioner followed the statutory and regulatory procedures[4] to obtain relief from the seizure, informing Customs that it had no role in the preparation of the merchandise description on the application, which was handled by a broker, and challenging Customs' authority to seize the goods in those circumstances (App., pp. 10a-22a). Customs agreed to return the merchandise upon payment of $40,000 (App., pp. 3a, 5a).

Petitioner complied with Customs' demand, but when the shipments were returned, merchandise valued at $165,220.50 was missing. Petitioner thereafter brought suit in the Court of Claims alleging, *inter alia,* a breach of an implied contract of bailment. The government moved for summary judgment, claiming that no bailment had been created and that, in any event, the suit was barred by sovereign immunity. The Court of Claims granted the government's motion and dismissed the petition. The court held that there was "clear congressional intent to retain sovereign immunity" with regard to claims arising out

[3]The provisions of 19 U.S.C. § 1592 were amended in 1978. See n. 7, *infra.*

[4]*See* 19 U.S.C. § 1618; 19 C.F.R. §§ 23.23-25 (1970). Section 1618 of Title 19 of the United States Code and sections 23.23-25 of Title 19 of the Code of Federal Regulations have been amended since the initiation of this action, but the amendments are not relevant to the manner in which the petition was filed with Customs and Customs agreed to return the goods in issue here. The successor provisions to 19 C.F.R. §§ 23.23-25 can be found at 19 C.F.R. §§ 171.11-13.

of the Customs Service's "detention" of goods, including claims for loss or damage to goods (App., pp. 25a-32a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Some unknown person or persons appear to have taken more than $165,000 worth of petitioner's camera supplies while they were being held in the custody of the United States Customs Service. The issue in this case is whether Congress intended to deny petitioner the legal right to have the Customs Service either return all the goods it had taken or make petitioner whole for whatever goods are missing. The Court of Claims acknowledged that the statutes which govern seizure and detention of goods by Customs "could make a strong case for the existence of an implied-in-fact contract properly to preserve and redeliver all the goods" to petitioner (App., p. 30a). The court held erroneously, however, that petitioner could not recover upon an implied contract because of the exception in the Federal Tort Claims Act for claims arising in respect of the "detention of any goods or merchandise by any officer of customs." 28 U.S.C. § 2680(c).

1. A bailment was created by the Customs Service's taking of petitioner's goods, by its statutory duty to return the goods if forfeiture proceedings resulted in judgment for the petitioner, and by its explicit undertaking to return the goods upon payment of $40,000. That contract was breached when the shipments were returned with a significant portion of the goods missing. In analogous circumstances, this Court and lower federal courts have recognized implied contractual obligations binding upon the government.

2. Our challenge to the Court of Claims' refusal to enforce this implied contract proceeds upon two alternative

grounds. Our first argument accepts, *arguendo,* the assumption that the exclusions of the Federal Tort Claims Act govern an implied contract action such as this one. Nonetheless, Section 2680(c) does not bar liability when the Customs Service does not merely "detain" goods but loses or damages them. The language of Section 2680(c) of the Federal Tort Claims Act prohibits suits based upon the "detention" itself; it does not bar recovery for loss or damage to goods while they are in the custody of the Customs Service.

The overbreadth of the Court of Claims' construction of Section 2680(c) is proved by comparing the limited language of that subsection with the broader language of other subsections, including the preceding subsection, which bars suits against the Postal Service "arising out of the loss, miscarriage, or negligent transmission" of the mails. The legislative history of Section 2680 demonstrates that Congress enacted subsection (b) to immunize the Postal Service from suits growing out of damage or loss to goods in its custody. But in enacting subsection (c), Congress had a different purpose: It wanted to avoid providing a federal remedy that would duplicate already existing procedures for challenging unlawful detentions or excessive duties imposed by government agents. Thus, subsection (c) deliberately contains no exemption from liability for loss or damage to goods while they are being detained by such officers. Congress intended to make the United States liable in these cases.

3. Our second argument is that the exemptions prescribed in the Federal Tort Claims Act, which appear in Section 2680, apply only to actions in tort, and not to suits for breach of contract brought under the Tucker Act. The decided cases confirm that the existence or denial of a

remedy under one of these two statutes has no effect on the availability of a remedy under the other.

4. There is no policy reason whatever to immunize government agencies that damage or lose private property which is temporarily in their custody. Particularly in the case of Customs seizures, private citizens have no standard commercially feasible means of insuring against such losses and the government makes none available. An owner of property that is temporarily in the custody of the Customs Service, whether by valid or invalid seizure, should be granted compensation by the bailee when, through no fault of the owner, the Customs Service mishandles or loses property. Any other legal rule would encourage carelessness and tolerate theft on the part of government agencies at the expense of the taxpayer.

I
THE SEIZURE AND DETENTION OF PETITIONER'S GOODS CREATED AN IMPLIED CONTRACT OF BAILMENT

A. The Common Law Recognized a Bailor-Bailee Relationship in These Circumstances.

We turn first to the question whether the relationship between petitioner and the Customs Service was that of bailor and bailee, as the viability of petitioner's contract claim depends on the existence of such a legal relationship. The general rule was laid down by this Court more than a century ago in *United States* v. *Thomas,* 83 U.S. (15 Wall.) 337 (1872), a case involving the responsibility of a

"surveyor of the customs for the port of Nashville, Tennessee." This Court said (15 Wall. at 345):

> A public officer having property in his custody in his official capacity is a bailee; and the rules which grow out of that relation are held to govern the case.

Although the issue in the *Thomas* case was the precise legal duty which the collector of customs owed *to the government*, the Court in the *Thomas* opinion surveyed a range of situations involving government custodians who secure temporary control over private property. It discussed the common-law obligations of the Postmaster-General with respect to "matter deposited in the post office" (15 Wall. at 343-344), and the legal responsibility of sheriffs with respect to "goods seized in execution" (15 Wall. at 344). The Court concluded that the governing legal principles in all these cases are found in "the doctrine of bailment," This conclusion rested, in part, on the respected authority of *Story on Bailments,* which the Court cited (15 Wall. at 342-343):

> It is laid down by Justice Story that officers of courts having the custody of property of suitors are bailees, and liable only for the exercise of good faith and reasonable diligence, and not responsible for loss occurring without their fault or negligence.

In his classic treatise on bailments, Justice Story also announced a similar rule with regard to "revenue officers and others, who seize property for supposed forfeitures." *Story on Bailments* § 618 (7th ed. 1863).[5] Hence it is clear

[5]Authority for this rule was Justice Story's own opinion, while sitting as Circuit Justice, in *Burke v. Trevitt,* 4 Fed. Cas. 746 (No. 2,163) (D. Mass. 1816). The defendant in *Burke v. Trevitt* was the captain of

that, under common-law principles, the Customs officials who seized petitioner's camera supplies became bailees, with an implied contractual duty to petitioner to keep its goods "with the same caution with which a prudent person would keep his own property." *Burke* v. *Trevitt,* 4 Fed. Cas. (No. 2,163) 746, 749 (D. Mass. 1816) (Story, J.). *Accord, Averill* v. *Smith,* 84 U.S. (17 Wall.) 82, 92-93 (1872); *Agnew v. Haymes,* 141 F. 631 (4th Cir. 1905).

Under established agency principles, the United States, as the employer of the Customs officials acting within the scope of their duties, is bound by the implied contract growing out of the officials' acts. The individual employees are bailees on behalf of the United States, which is their principal. *Agnew v. Haymes,* 141 F. 631 (4th Cir. 1905). *See United States* v. *Lynah,* 188 U.S. 445 (1902); *Cooke* v. *United States,* 91 U.S. 237 (1875); *Bank of Boston* v. *United States,* 10 Ct.Cl. 519, 543 - 544 (1874), *aff'd,* 96 U.S. 30 (1878).[6]

a revenue cutter who had seized a schooner carrying tobacco, for an alleged violation of the revenue laws. When the trial resulted in an acquittal and the schooner was returned, the tobacco was missing, apparently as a result of a night-time theft.

In reliance on common-law precedent, Mr. Justice Story held that government agents seizing property in this manner (4 Fed. Cas. at 748),

> are generally bound for two things, for safe and fair custody, and, if the property is lost, or destroyed, for want of that safe and fair custody, they are responsible for the loss.

[6]Of course, the government is liable only if the actions of its employees are within their actual or ostensible authority. If a government agent acts totally outside the range of his delegated authority, the ordinary rules of principal and agent might entitle the United States to disclaim his conduct and refuse to be bound by an unauthorized action he has taken which gave rise to a claim of implied contract. That appears to have been the reasoning on which the Court

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B. The Circumstances of the Seizure Gave Rise to an Implied Contract.

Treating the United States as a bailee under an implied contract is consistent with the specific statutory and voluntary obligations assumed by the United States in this case and with the general rules regarding implied contracts that arise out of governmental functions.

Petitioner's goods were seized by the Customs Service upon an alleged violation of 19 U.S.C. § 1592, which prohibited the importation of goods under an incorrect declaration. Upon seizure, the merchandise became "subject to forfeiture."[7] Petitioner asserted that the inaccuracy

of Claims based its very early decision in *Schmalz v. United States*, 4 Ct.Cl. 142 (1868), where the government was not held liable for the loss of goods where there was no "reasonable cause for the seizure." 4 Ct.Cl. at 148.

[7]The seizure was undertaken pursuant to the then existing provisions of 19 U.S.C. § 1592. Tariff Act §592, Ch. 497, § 592, 46 Stat. 750 (1930); Ch. 438, § 304(b), 49 Stat. 527 (1935). That statute was amended in 1978. 92 Stat. 893. The prior statute provided, in relevant part:

> If any consignor, seller, owner, importer, consignee, agent, or other person or persons enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any false statement . . . or makes any false statement in any declaration under the provisions of section 1485 of this title (relating to declaration or entry) without reasonable cause to believe the truth of such statement, . . . whether or not the United States shall or may be deprived of lawful duties, or any portion thereof, accruing upon the merchandise, . . . such merchandise . . . shall be subject to forfeiture, which forfeiture shall only apply to the whole of the merchandise. . . .

The current statute, by contrast, permits seizure in more limited circircumstances, *i.e.*, where seizure is necessary to protect the revenue, or is necessary to prevent entry of prohibited merchandise or the im-

in the declaration was the result of a technical error by the customs broker who handled the transaction and that, in any event, the seizure was not authorized by the statute (App., pp. 10a - 22a).

These arguments could have been pressed at a forfeiture proceeding, and if petitioner had prevailed, the Customs Service would have been obliged to return petitioner's merchandise intact, pursuant to 28 U.S.C. § 2465, which states:

> Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant or his agent.

Following an alternative procedure,[8] petitioner filed for remission of the forfeiture pursuant to 19 U.S.C § 1618,

porter is insolvent. 19 U.S.C. §1592(c)(5). Moreover, under the current statute, penalties of less than the entire value of the merchandise are provided, with lesser penalties for negligence than for fraud. There are no penalties for nonnegligent misstatements or clerical errors.

[8]Because the then existing provisions of 19 U.S.C. § 1592 imposed a penalty of wholesale forfeiture of the merchandise without regard to degree of culpability, petitioner could avoid the risk of a wholly inequitable forfeiture only by petitioning for remission and accepting whatever mitigated penalty the Customs Service set. In recommending the Customs Reform Act which amended 19 U.S.C. §1592, the Senate Finance Committee noted (S. Rep. No. 95-778, 1978 U.S. Code Cong. & Adm. News, p. 2214):

> The respondent is forced to choose between accepting the mitigated administrative penalty or face a Government suit, in which case the claim is for full forfeiture value. The court can only decide whether or not a violation occurred. It cannot change the amount of the statutory penalty, domestic value.
>
> The risks of litigation are enormous . . . .

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which permits remission if the error was not intentional or if there were mitigating factors. In response, the Commissioner offered to return the goods upon payment of a $40,000 penalty (App.,pp. 3a, 5a).

In these circumstances, there was an implied-in-fact contract between the United States and petitioner to hold and preserve petitioner's goods. The implied contract was based upon (1) the statutory context of the Customs Service's seizure and detention of petitioner's goods pending either a judicial forfeiture proceeding or an administrative resolution and (2) the Service's representation to petitioner that it would return the goods. During the period following the seizure, the goods were to be "placed and remain in the custody of the collector . . . to await disposition according to the law." 19 U.S.C. § 1605. The Customs Service was under a specific statutory duty to return the goods if petitioner prevailed. 28 U.S.C. § 2465. And it is uncontroverted that the Customs Service explicitly agreed to return the goods upon payment of a $40,000 penalty. There is nothing in the record — no disclaimer of liability and no regulation limiting responsibility for goods — to negate a duty and an intention on the part of the United States to return to the petitioner all of its merchandise.[9]

In a similar statutory framework, the Court of Appeals for the Second Circuit concluded that the United States

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In these circumstances, Congess found that "[v]irtually every importer petitions for mitigation," and most importers pay the mitigated penalty rather than risk litigation. *Id.* at p. 2229.

[9]These factors clearly bring this claim into the area of contracts "implied in fact" as contrasted with those "implied in law." Thus, even if the latter may not be the basis for recovery under the Tucker Act, *Merritt v. United States*, 267 U.S. 338, 341 (1925), that rule is inapplicable here. *See Algonac Mfg. Co. v. United States*, 428 F.2d 1241, 1256 (Ct.Cl. 1970).

had the implied-in-fact contract responsibilities of a bailee. In *Alliance Assurance Co. v. United States*, 252 F.2d 529 (2d Cir. 1958) (Pet. App., pp. 11a - 24a), goods were detained for inspection by Customs for determination whether they were of the value and quantity declared in the invoice. The goods passed inspection, but they disappeared before they could be returned to the importer, whose subrogee thereafter sued the United States for breach of an implied contract of bailment. The government asserted that no contract of bailment was created by Customs' control over the merchandise.

The Second Circuit ruled, however, that an implied contract of bailment existed because the process by which the goods were detained and held by the Customs Service created a mutual understanding that the goods would be returned (252 F.2d at 532):

> The obligation of the government . . . stemmed from an implied promise to redeliver the goods as soon as customs had checked them against the invoice. . . . It arises from the implied promise to return the goods to the lawful owner after the customs inspection has been completed.

In this case, as in *Alliance*, the statutes and regulations demonstrate that an implied-in-fact contract existed.[10] Even the Court of Claims said (App., p. 30a):

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[10]The sole difference between the procedures in *Alliance* and those here — a difference which the Court of Claims mentioned but upon which it did not base its decision — is that the merchandise in *Alliance* was simply "detained" for comparison of the goods and the invoice, while in this case, the merchandise was "seized" and "subject to forfeiture." *Compare* 19 U.S.C. §1499 *with* former 19 U.S.C. §1592. Under the procedures at issue in *Alliance*, merchandise could not be

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> [T]he statutes cited by the plaintiff, along with the action of [Customs] in agreeing to return the seized goods upon payment of a $40,000 fine by Hatzlachh, could make a strong case for the existence of an implied-in-fact contract properly to preserve and redeliver all the goods to Hatzlachh.

C. The Government Has Been Held Liable on Implied-In-Fact Contracts in Analogous Circumstances.

The legal proposition being urged in this case is far from a novel one. There are many situations in which a bailment contract or a similar obligation to return property or pay compensation for its use has been implied-in-fact from the conduct or the statutory duties of government agents. In *C.F. Harms Co.* v. *Erie R. Co.*, 167 F.2d 562 (2d Cir. 1948), for example, a charterer of a barge was ordered to deliver the barge and the equipment on it to the Army at a particular pier. While it was in the custody of the Army,

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delivered from Customs until it had been "inspected, examined or appraised" and was reported to have been accurately invoiced. If goods had not been properly invoiced, with fraudulent intent, they were "liable to seizure." Otherwise, after the proper duties were assessed and paid, the goods could be released. Under the procedure at issue here, the importer could institute administrative process to challenge the seizure and, if it prevailed, the merchandise was to be "returned forthwith to the claimant." 28 U.S.C. § 2465. If, as here, Customs found that the importer had no knowledge of the false statement that caused the seizure or that there were mitigating circumstances, it could impose a reasonable condition and then return the goods. *See* 19 U.S.C. § 1618.

Hence there is no real difference, for bailment purposes, between the "detention" in *Alliance* and the "seizure" in this case. Both cases involved temporary detentions that could have led to permanent forfeiture. In both cases, following administrative procedures, the goods were released.

the barge was damaged in a storm. Although no express agreement had been made as to the responsibility of the Army to maintain or protect the barge, the Court of Appeals for the Second Circuit, in an opinion by Judge Learned Hand, found an implied-in-fact contract of bailment upon which the government could be sued under the Tucker Act (167 F.2d at 564):

> [H]ere it seems to us that there was a bailment, view the evidence as one will. The Army's control was unconditional; it need ask no leave of the Railroad for anything it might do; it could move the [barge] whither and when it chose; discharge her, or hold her, as it pleased. This officer in charge understood; the Railroad understood; and each knew that the other so understood; and we can find nothing lacking which is essential to a bailment.

Accord, Gulf Transit Co. v. *United States,* 43 Ct.Cl. 183, 193 (1908). *Cf. Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U.S. 381, 387 (1939); *Jaeger* v. *United States,* 394 F.2d 944, 946 (D.C. Cir. 1968); *Van Buskirk* v. *United States,* 206 F.Supp. 553, 558 (E.D.Tenn. 1962); *Marine Insurance Co.* v. *United States,* 410 F.2d 764, 766 (Ct.Cl. 1969).

Similarly, an implied-in-fact contractual obligation arises where there is a statutory duty to return or pay compensation for property. *Campbell* v. *United States,* 107 U.S. 407 (1883); *Foster* v. *United States,* 32 Ct.Cl. 170 (1897); *Taylor* v. *United States,* 14 Ct.Cl. 339, 353 (1878). This principle has been applied to seizures by the government in various contexts. For example, where the Internal Revenue Service seized goods and stored them pursuant to regulations that contemplated payment for the use of such

premises, the court found an implied promise to pay the party whose premises were used, even though the government thereafter denied any intent to obligate itself (*Maryland National Bank v. United States*, 227 F. Supp. 504, 507-508 (D.Md. 1964)):

> The intent of the government to obligate itself may be implied from other provisions of the regulations . . . . These regulations provide that the United States shall pay for the expenses of the levy from the proceeds of the sale . . . .
>
> The court therefore finds an intent on the part of both parties to obligate themselves and a contractual relationship, implied in fact, between them.

Accord, Feldwin Realty Co. v. *United States*, 169 F. Supp. 73 (D.N.J. 1959).[11]

[11]Similarly, where the United States appropriates lands for its own use, or where, in the process of taking land, it floods adjoining property, it can be sued upon an implied-in-fact promise to provide "just compensation" as required by the Fifth Amendment, just as it can be sued directly under that constitutional provision. *United States v. Dickinson*, 331 U.S. 745, 748 (1947); *United States v. Lynah*, 188 U.S. 445, 464-65 (1902); *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656-57 (1884). *Cf. United States v. Causby*, 328 U.S. 256, 267 (1946). As the Court in *Dickinson* explained (331 U.S. at 748):

> These suits against the Government are authorized by the Tucker Act either as claims "founded upon the Constitution of the United States" or as arising upon implied contracts with the Government. (See . . . *United States v. Lynah* . . . .) But whether the theory of these suits be that there was a taking under the Fifth Amendment, and that therefore the Tucker Act may be invoked because it is a claim founded upon the Constitution, or that there was an implied promise by the Government to pay for it, is immaterial. In either event, the claim traces back to the prohibition of the Fifth Amendment, "nor shall private property be taken for public use, without just compensation."

A finding that the government is a party to an implied contract based upon the conduct or duties of its agents is not negated by a subsequent denial of responsibility by the government. *Algonac Manufacturing Co.* v. *United States*, 428 F.2d 1241, 1257 (Ct.Cl. 1970). An implied-in-fact contract exists where the circumstances and the statutory context indicate that the government had a duty to act in a particular manner with regard to a private party's property and that party reasonably expected the government to do so.

II

THE TORT CLAIMS ACT DOES NOT BAR AN ACTION FOR THE LOSS OF DETAINED GOODS

Although the Court of Claims acknowledged that there was substantial basis for finding an implied-in-fact contract properly to preserve and redeliver petitioner's goods, the Court dismissed petitioner's breach-of-contract action on the ground that such a claim was barred by the proviso to the Federal Tort Claims Act which exempts the United States from tort liability "arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." This clause, included in the original 1946 enactment of the Federal Tort Claims Act (60 Stat. 842), now appears as Section 2680(c) of the Judicial Code, 28 U.S.C. § 2680(c).

The Court of Claims' interpretation of Section 2680(c) is erroneous, however, because it conflicts with the language of the statute as well as with its legislative history. The decided cases that have analyzed the exemption of Section 2680(c) in light of the policies which impelled Congress to

enact it, have properly concluded that Section 2680(c) exempts only claims based upon a customs officer's *detention* of goods, and not claims for loss or damage suffered by goods after they have been detained.

A. The Words Used in Section 2680(c) Are Inconsistent with the Court of Claims' Broad Interpretation

The language used by Congress in Section 2680(c), when compared with that used in the eleven other exceptions enacted by Congress at the same time, demonstrates that subsection (c) was not intended to provide broad immunity for all acts committed by federal customs officials. Instead, Congress exempted from federal tort liability only injuries attributable to the bare detention of goods by customs officers.

The full text of Section 2680 as it was enacted in 1946, appears in Appendix A to this brief (pp. 1a - 2a, *infra).* The full section was titled "Exceptions," and it enumerated the various exclusions which Congress wished to make to the basic liability provisions of the Act. Subsection (c) differs from the various broad exceptions in Section 2680 in several major respects:

First, subsection (c) is not a blanket exemption for all of the activities of any particular agency of government or for all injuries attributable to the enforcement or administration of any particular federal statute. If Congress had wanted to exempt the Customs Service from liability or had wanted to immunize the federal government for any losses related to enforcement of the customs laws, it could have provided an exemption for "any claim arising from the activities" of the Customs Service (as appears in subsections (j) and (l)) or for "any claim arising out of an act or omission . . . in administering the provisions" of

the customs law (as appears in subsection (e)). The language of subsection (c) is much more narrow than these broad functional exceptions. It exempts *only* injuries attributable to the "assessment or collection" of a tax or customs duty or to the "detention" of goods.

Second, the language of subsection (c) differs markedly from that of its immediate predecessor, subsection (b). Whereas subsection (b) exempts "any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter," subsection (c) makes no reference whatever to "loss" or to any other form of damage to goods. It is limited to "detention" only. Congress was plainly conscious of the words it could use to exempt from liability any harm caused to privately owned property by officials of the federal government. It chose to provide that exemption in subsection (b), wherein it dealt with Postal Services, but not in subsection (c), where it set forth the exception applicable to the activities of the Customs Service.

Third, even the term used in describing the causal nexus between the governmental acts and the injury suffered by the claimant is uniquely narrow in subsection (c). Whereas the other exceptions cover claims "arising out of" (subsections (b), (e), (h), (j)), "arising from" (subsections (g), (l)), or "caused by" (subsections (f), (i)) specified governmental acts or legislative authorizations, subsection (c) is the only exception which is limited to claims "arising in respect of" defined governmental conduct. This more limited phrasing negates any suggestion that losses suffered *after* a detention by Customs, and arguably arising "out of" or "from" the detention, or "caused by" the detention, were also immunized by the Congress.

B. The Legislative History of Section 2680(c) Conflicts with the Construction of the Court of Claims.

The inferences that one draws from the distinctions in language among the exceptions included in Section 2680 are supported by the legislative history of that provision. The reports of the Congressional Committees and the testimony provided to the Congress demonstrate that significantly different policies were at play in the enactment of these exceptions. Specifically, the exceptions enumerated in Section 2680 were of two different varieties:

(1) One group of exceptions expressed a legislative policy of immunizing acts of government officials which were thought by Congress to be so intrinsically a part of day-to-day government activities that a waiver of sovereign immunity would be contrary to the public interest. Congress thought that permitting lawsuits in this area – typified by the Postal Service's delivery of United States Mail – would open the floodgates to countless civil actions against the federal government.

(2) A second group of exceptions was included in the Tort Claims Act not because Congress wanted to immunize acts of government officials in these areas but because existing law had provided other remedies for such conduct. Congress did not want to superimpose the Tort Claims Act on these existing remedies.

Subsection (c) was in the second group. The exception in that subsection was not intended, in light of these policies, to exempt the Customs Service from all liability, but rather to avoid interfering with the existing remedial machinery for challenging the detention of goods or the assessment of duties. So far as loss or damage goes,

however, Congress deliberately did not immunize the United States from liability for conduct causing this harm.

The report of the House Judiciary Committee which accompanied the version of the Federal Tort Claims Act that came before the House of Representatives in November 1945 explained that the exemptions contained in the present Section 2680 (apart from the "discretionary function" exemption in the first subsection) were of two varieties (H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945):

> The other exemptions in section 402 relate to certain governmental activities which should be free from the threat of damage suits, or for which adequate remedies are already available.

In other words, Congress was providing *either* that certain governmental activities should not be subject to damage suits at all *or* that certain harm was already sufficiently covered by existing remedial provisions. A similar dual categorization of many of the exemptions in the present Section 2680 was included in Sen. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946), when the Federal Tort Claims Act was offered for Senate consideration as part of the Legislative Reorganization Act of 1946, the form in which it was ultimately adopted.

The exemption provided in subsection (c) was in the second of these categories (*i.e.*, it related to "governmental activities . . . for which adequate remedies are already available"), and not in the first category (*i.e.*, it did not involve "governmental activities which should be free from the threat of damage suits"). The most detailed official analysis of the enumerated exemptions was provided in hearings held in 1940 before a Subcommittee of the Senate Judiciary Committee, and it was in those hearings that the exemptions were explained by future District Judge

Alexander Holtzoff, who was then a Special Assistant to the Attorney General and served as the Executive Branch's principal spokesman in the drafting of the Federal Tort Claims Act. Mr. Holtzoff's testimony with regard to what are now subsections (b) and (c) of Section 2680 was as follows (Hearings on Tort Claims Against the United States (S. 2690) before a Subcommittee of the Senate Judiciary Committee, 76th Cong., 3d Sess. 38 (1940) (emphasis added)):

> Section 303 contains a list of claims that are to be excluded from the scope of the proposed legislation. There are 12 such classes.
>
> The first is any claim arising out of the loss of, miscarriage, or negligence in the transmission of letters or postal matter. Every person who sends a piece of postal matter can protect himself by registering it, as provided by the postal laws and regulations. It would be intolerable, of course, if in any case of loss or delay the government could be sued for damages. Consequently, this provision was inserted.
>
> The second exception relates to claims arising in respect of the assesment or collection of any tax or customs duty or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer. ***There are various tax laws providing the machinery for recovering any back tax that has been paid but was not properly owing. There was no purpose in interfering with that machinery.***

Apparently as a result of Mr. Holtzoff's testimony in 1940, the conclusion that some of the exemptions now included in Section 2680 represented instances where "adequate remedies are already available" was repeated in legislative reports and hearings in succeeding years. See Hearings on Tort Claims (H.R. 5373 and H.R. 6463) before the House Committee on the Judiciary, 77th Cong., 2d Sess. 28, 44 (1942); H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942); S. Rep. No. 1196, 77th Cong., 2d Sess. 7 (1942). This consistent pattern demonstrates that the successive Congresses which considered the Federal Tort Claims Act provisions in the several years prior to its passage viewed subsection (c) as granting no real exemption. It was, rather, designed to prevent owners of detained goods from pursuing an overlapping or additional remedy.

The statutory remedies which Congress wished to leave undisturbed permitted challenges to (1) the propriety of a detention and (2) the duty assessed. 19 U.S.C. §§ 1602-1614 (1946); 19 U.S.C. §§ 1514-1519 (1946); 28 U.S.C. §§ 296-297 (1946); 28 U.S.C. § 2674 (1940). There were, on the other hand, no particular statutory procedures for the recovery of damages for loss or damage to goods while in the custody of Customs officers. The exception now contained in Section 2680(c) was limited, therefore, to suits challenging the imposition of duties or a decision to detain goods.[12] It was not a blanket exemption

[12] A challenge to a Customs seizure or detention must follow the administrative process provided by Congress and may not be achieved through the Tort Claims Act. For example, the court in *DeBonis* v. *United States*, 103 F.Supp. 119, 121 (W.D.Pa. 1952), held that there was no jurisdiction under the Tort Claims Act to challenge a customs detention:

> Our reasons for thus concluding is that Congress who set forth in the forfeiture acts the specific manner in which the issues of illegal seizure and forfeiture should be litigated,

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for all activities of Customs officers, and it was surely not an exemption from liability for the loss of goods held in the custody of the Customs Service.

This understanding of the legislative history of subsection (c) is corroborated by the unanimous view of legal commentators. The leading articles analyzing the Federal Tort Claims Act have all read subsection (c) as exempting from the Act only the kind of conduct which was covered by pre-existing statutory remedies. The comprehensive Note on *The Federal Torts Claims Act,* 56 Yale L.J., 534, 545-546 (1947), explained the purpose of the postal exception as follows (footnotes omitted):

> Closely related to [the] general immunity for official acts are four specific exceptions which provide that the jurisdiction of the courts shall not extend to: "any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter;" "any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act, as amended;" "any claim for damages caused by the imposition or establishment of a quarantine by the United States," and "any claim for damages caused by the fiscal operation of the Treasury or by the regulation of the monetary system." These provisions . . . cover even gross negligence in performing a ministerial duty . . . . These four exceptions reveal an abundance of caution on the part of

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did not intend that these issues should be litigated under the general provisions of the Federal Tort Claims Act.

Accord, Bambulas v. United States, 323 F.Supp. 1271, 1273 (W.D.S.D. 1971); *Newstead v. United States,* 258 F.Supp. 250, 251 (E.D.Mo. 1966).

> Congress in relaxing the Government's immunity. . . . The postal exception is based on the number of cases which might arise were it not included.

The customs exception is however, placed in a different group (*id.* at 547-548; emphasis added):

> Another group of exceptions is included *because of satisfactory provisions already made for handling the claims covered.* This group includes the collection of taxes and customs duties, maritime torts, injury to vessels or their cargo, crew or passengers while in the Panama Canal, and the activities of the TVA.

The same distinction was drawn in *The Federal Tort Claims Act,* 42 Ill. L. Rev. 344, 360 (1947) (footnote ommitted and emphasis added):

> Another group of exceptions, which exempt claims arising out of losses of postal matter, operations of the monetary system and losses due to activities of the military forces, may be explained by the historical desire of the government to maintain its immunity from suit in instances where it cannot reasonably determine or limit the amount of its future liability. Claims in respect to the collection of taxes or retention of goods by customs officers, admiralty claims covered by the Acts of 1920 and 1925, injuries incurred in the Panama Canal, and damages caused by activities of the Tennessee Valley Authority are also exempted, *since remedies for these claims are provided in other statutes.*

In Gottlieb, *The Federal Tort Claims Act – A Statutory Interpretation,* 35 Geo. L.J. 1, 45 (1946), the purpose of the postal matter exception was said to be "clear on its face and [to] follow the basic principle underlying the non-statutory exceptions in this section, namely, that certain functions of the Government by their very nature should operate unhampered by threat or burden of law suits." By contrast, the author said, the basis for the customs exception "lies in the existence of an adequate, subsisting remedy upon which suits against the United States have heretofore been entertained." *Accord,* Gellhorn and Schenck, *Tort Actions Against the Federal Government,* 47 Colum. L. Rev. 722, 729-730 (1947); Jayson, *Federal Tort Claims Act,* §§ 225, 256 (1977).

The language and purpose of subsection (c) were correctly discerned by the Court of Appeals for the Second Circuit in *Alliance Assurance Co.* v. *United States,* 252 F.2d 529 (2d Cir. 1958), the decision which concededly conflicts squarely with the decision of the Court of Claims in this case.[13] In *Alliance,* the Second Circuit rejected the government's argument that "a 'detention' as used [in the Tort Claims Act] encompasses not only a refusal to deliver goods admittedly in the possession of customs authorities but a loss of goods formerly in their possession," as unsupported by either the language of the Act or its purpose (252 F.2d at 533-534):

[13]None of the federal decisions which read Section 2680(c) as conferring a broader immunity or which distinguish *Alliance* either examined the legislative history of Section 2680(c) or dealt explicitly with the narrow language of that subsection. *See United States v. One (1) 1972 Wood, 19 Ft. Custom Boat,* 501 F.2d 1327 (5th Cir. 1974); *United States v. 1500 Cases, More or Less, Etc.,* 249 F.2d 382 (7th Cir. 1957); *Walker v. United States,* 438 F.Supp. 251 (S.D.Ga. 1977); *S. Schonfeld Co. v. SS Akra Tenaron,* 363 F.Supp. 1220 (D.S.C. (cont'd)

> The probable purpose of the exception was to prohibit actions for conversion arising from a denial by the customs authorities or other law enforcement agencies of another's immediate right of dominion or control over goods in the possession of the authorities.

The Second Circuit found the comparison with Section 2680(b) – the postal exception – particularly telling *(ibid.):*

> That the exception does not and was not intended to bar actions based on negligent destruction, injury or loss of goods in the possession or control of the customs authorities is best illustrated by the fact that the exception immediately preceding it expressly bars actions "arising out of the loss, miscarriage, or negligent transmission" of mail. 28 U.S.C.A. § 2680(b). If Congress had similarly wished to bar actions based on the negligent loss of goods which governmental agencies other than the postal system undertook to handle, the exception in 28 U.S.C.A. § 2680(b) shows that it would have been equal to the task. The conclusion is inescapable that it did

1973); *United States v. Articles of Food, Etc.,* 67 F.R.D. 419 (D.Idaho 1975).

Almost all of these cases, which deny jurisdiction under the Federal Tort Claims Act pursuant to Section 2680(c), involve claims for the return of goods or for damages resulting from a detention *per se,* as opposed to subsequent damage to or loss of seized goods. *United States v. 1500 Cases, supra; Walker v. United States, supra; United States v. Articles of Food, supra. See also, United States v. One 1951 Cadillac Coupe de Ville,* 125 F.Supp. 661 (E.D.Mo. 1954). These cases are plainly distinguishable from the present case.

> not choose to bestow upon all such agencies general absolution from carelessness in handling property belonging to others.

And in *A-Mark, Inc.* v. *United States Secret Service,* 593 F.2d 849 (9th Cir. 1979) (Pet. Reply App., pp. 1a-5a),[14] the Court of Appeals for the Ninth Circuit reached the same conclusion. In a suit for damage to a rare coin seized by the Secret Service, the Court held:

> [T]he exception reaches only those claims asserting injury as a result of the fact of detention itself where the propriety of the detention is at issue, and does not reach claims where the injury is asserted to result from negligent handling of property in the course of detention.

See also United States v. *Lockheed L-188 Aircraft,* No. 77-1131 (9th Cir. Feb. 15, 1979), n.16 (Section 2680(c) bars suit for loss of services of detained vehicles but not for damage to the vehicles).[15]

The holding of the Court of Claims – that Section 2680(c) bars a claim for damage or loss to detained goods – is plainly erroneous. Without studying the legislative history, without comparing the more narrow language of the postal exception, without considering the various cases

[14]"Pet. Reply App." refers to the Appendix to the Petitioner's Reply Memorandum filed in this case.

[15]In *Marine Insurance Co. v. United States,* 410 F.2d 764, 765 (Ct.Cl. 1969), the court denied recovery for the loss of gems during a mail search because the lost package was "postal matter," not "customs matter," at the time that it was lost. *Cf. DeBonis v. United States,* 103 F.Supp. 123, 126 (W.D.Pa. 1952) (Section 2680(c) does not bar action for damages from seizure of automobile) (dictum)); *Otten v. United States,* 210 F.Supp. 729, 731 (S.D.N.Y. 1962) (Section 2680(c) does not bar suit against federal marshal who holds stolen bonds no longer needed as evidence).

relating to this question, the Court of Claims dismissed petitioner's "strong case for the existence of an implied-in-fact contract" in two sentences (App., p. 31a):

> With. . . strong, all-inclusive language, the legislative branch of our Government affirmatively recognized the vital importance to the public of unimpeded lawful operations by customs officers and refused to waive sovereign immunity with respect to those functions specified. Notwithstanding the possible interpretation which the *Alliance* court might give to the facts now before us, it appears clear to us that Hatzlachh's claim obviously arose "in respect of . . . the detention of . . . goods or merchandise by [an] . . . officer of customs . . . ."

It is clear from the legislative history that the language of Section 2680(c) is not "all-inclusive" but is, rather, narrowly tailored to exempt from suit only actions challenging the detention of goods or the imposition of a duty, because there were, prior to enactment of the Federal Tort Claims Act, procedures for such challenges established by Congress. Section 2680(c) was not intended to immunize all actions of the Customs Service, and it does not reach the conduct that is the basis of this lawsuit.

III

GOVERNMENT CONDUCT EXEMPTED FROM LIABILITY UNDER THE TORT CLAIMS ACT MAY BE THE BASIS FOR SUIT UNDER THE TUCKER ACT

We have demonstrated that, contrary to the conclusions of the court below, Section 2680(c) does not exempt the government from tort liability for loss or damage to goods detained by Customs officers. Even if we are wrong on this proposition, however, the Court of Claims erred in dismissing petitioner's suit because petitioner's claim was not based on tort liability but on an implied contract of bailment, and implied contracts are not at all the subject of the Federal Tort Claims Act.

The court below acknowledged that this was not a tort case, but it nonetheless dismissed petitioner's claim on the theory that it would be "a trespass on congressional prerogatives" to permit a party to sue on an implied contract if the same facts are covered by a legislative exception from liability under the Federal Tort Claims Act. App., p. 31a. The Court of Claims' reasoning and conclusion are patently wrong.

Almost a century before the enactment of the Federal Tort Claims Act, the Congress subjected the United States to suit in the Court of Claims on express and implied contracts. 10 Stat. 612 (1855); 12 Stat. 765 (1863). The Tucker Act of 1887 (24 Stat. 505) continued and extended the government's contract liability, and granted concurrent jurisdiction over some contract claims to the district courts. When Congress also opened the government to tort liability with the 1946 adoption of the Tort Claims Act, it did not cut back on pre-existing contract liability under the Tucker Act. In fact, the "exceptions" provision which is the subject of this case, 28 U.S.C. §2680, states

explicitly that "[t]he provisions of *this chapter* and *Section 1346(b) of this title* shall not apply to" the enumerated exemptions (emphasis added). Thus, Section 2680 is applicable only to *tort* actions. Neither expressly nor impliedly did Congress in the Federal Tort Claims Act immunize governmental agencies from contract claims which could have been pursued before the Federal Tort Claims Act was adopted.

Numerous decisions of federal courts have held that whether an action against the government would be barred as a tort claim has no effect on whether it may be brought as a contract claim. In *United States v. Lockheed L-188 Aircraft,* No. 77-1131 (9th Cir. Feb. 15, 1979), the Ninth Circuit held that a claim that sounded in tort could also be brought under the Tucker Act's provisions for suits "founded . . . upon the Constitution." *In Palomo v. United States,* 188 F.Supp. 633 (D.Guam 1960), it was held that the lessor of property to the United States could sue in tort for damages for waste, or could elect to proceed upon the contract. In *Burtt v. United States,* 176 Ct.Cl. 310, 314 (1966), the court stated: "[W]here an enforceable contract was alleged, an action for breach was not without the bounds of the Tucker Act simply because elements of tort were present in the claim." *Cf. Bambulas v. United States,* 323 F.Supp. 1271, 1273 (W.D.S.D. 1971) and *Newstead v. United States,* 258 F.Supp. 250, 251-252 (E.D.Mo. 1966) (claims under Tucker Act considered after conclusion that tort claim would have been barred by 28 U.S.C. § 2680(c)). *See also Regional Rail Reorganization Act Cases,* 419 U.S. 102, 127-136 (1974) (passage of Rail Act did not withdraw Tucker Act remedy).

With respect to bailments in particular, a bailor may sue the government in tort, for negligent handling of property, or for breach of a contract of bailment. In *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939), a

suit brought before the enactment of the Federal Tort Claims Act, this Court rejected the government's argument that it could not be sued for breach of a contract of bailment because it could not then have been sued for negligence on a tort theory. The Court noted that the duty of a bailee to exercise ordinary care has its "sources in contract even though the guilty agents may be merely tortfeasors." 306 U.S. at 395. Similarly, in *New England Helicopter Service v. United States,* 132 F.Supp. 938, 939 (D.R.I. 1955), the district court rejected the government's argument that the sole remedy available for a breach of contract of bailment was suit under the Tucker Act, noting that the United States was to be "treated as if it were a private person" and a private person, in similar circumstances, could be sued in either tort or contract.[16]

The principle followed by the Court of Claims has the unusual – and plainly erroneous – effect of using the Federal Tort Claims Act to bar an implied contract action that could have been successfully maintained before the government's immunity from tort suits was waived. This would be contrary to the overriding purpose of the Federal Tort Claims Act, which was designed to facilitate claims against the government, not to bar them by arbitrary classifications.[17] As the Third Circuit observed in *Aluetco*

[16] *See Boland v. Southern Ice Co.,* 80 F.Supp. 924 (E.D.S.C. 1948); 8 C.J.S. *Bailments* § 44(b).

[17] The legislative history of the Federal Tort Claims Act expresses "the congressional desire to avoid unnaturally restrictive interpretation" of the waiver of sovereign immunity (Gellhorn and Schenck, *Tort Actions Against the Federal Government,* 47 Colum. L.Rev., 722, 727 (1947) (footnote omitted)):

> [T]he whole atmosphere surrounding the passage of the present statute manifests a legislative desire to be rid of finicking restraints upon the right to sue the sovereign. One may anticipate that courts, mindful of the background of the law, will approach it with an attitude somewhat like that of Justice Cardozo, who asserted two

(cont'd)

Corp. v. United States, 244 F.2d 674, 679 (3d Cir. 1957), when it rejected the argument that a claim must be classified as either a tort or a contract so that the Federal Tort Claims Act or the Tucker Act would apply exclusively:

> [R]equiring strict enforcement of the distinction . . . would be contrary to the purpose for which the Tort Claims Act was enacted. The waiver of immunity of the United States to suit was the primary purpose of the various enactments conferring jurisdiction on the federal courts to hear such suits . . . . [T]he jurisdiction of [the Court of Claims] has been sustained where elements of both contract and tort were involved in the claim.

In the same vein, this Court refused to read the contract adjudication provisions of the Tucker Act – even before the Federal Tort Claims Act was adopted – as excluding claims "sounding in tort." It said in *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U.S. 381, 395-396 (1939):

> When it chose to do so, Congress knew well enough how to restrict its consent to suits sounding only in contract . . . [I]t ought not to be assumed that when Congress consented "to suit" without qualification, the effect is the same as though it had written "in suits on contract, express or implied, not sounding in tort." No such distinction was made by Congress . . . .

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decades ago that "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

The contrary result reached by the court below grew out of the misapplication of a line of decisions based on a substantially different principle of statutory construction. Where Congress has specified a distinct procedure and provided a particularized remedy for certain kinds of claims, neither the Federal Tort Claims Act nor the Tucker Act may be used to circumvent the prescribed statutory remedy. *Feres v. United States,* 340 U.S. 135 (1950), and *Stencel Aero Engineering Corp* v. *United States,* 431 U.S. 666 (1977), presented that kind of situation – which is entirely dissimilar to the situation presented by this case.

Both *Feres* and *Stencel* concerned efforts to bypass the procedures set forth in the Veterans' Benefit Act for injuries sustained while in military service. In *Feres,* this Court held that a serviceman must follow the procedural and substantive provisions of statutes aimed specifically at injuries sustained while in service, and in *Stencel,* this Court applied the *Feres* rule to indemnity claims by third parties, because otherwise the specific statutory scheme would have been easily avoided.

The principle of these rulings is plainly inapplicable where there is no particularized statutory mechanism governing the claim made against the United States. If there were a federal statute setting forth procedures and substantive rules concerning loss or damage to property temporarily in the custody of the United States, the *Feres* case might be authority for remitting petitioner to that course and denying it access under the Tucker Act or the Tort Claims Act. But in the absence of any such specific procedure, a contract claim cannot be rejected simply because Congress did not choose to open the courthouse doors to a tort claim based on the same facts.[18]

[18]Moreover, as the Court of Claims observed in expanding on *Feres* in *Jackson v. United States,* 573 F.2d 1189, 1198 (Ct. Cl. 1978), no serviceman had ever been awarded damages for military injuries on

(cont'd)

IV

NO VALID REASONS OF POLICY JUSTIFY IMMUNIZING THE UNITED STATES AGAINST LIABILITY FOR LOSS OR DAMAGE TO SEIZED GOODS

We have established, in the preceding sections of this Brief, that the common law viewed a governmental seizure of goods as giving rise to a bailment relationship, that the language and legislative history of the Federal Tort Claims Act indicate that Congress waived sovereign immunity for loss or damage to seized goods, and that exceptions in the Federal Tort Claims Act ought not, in any event, apply to contractual claims. We turn now to a final question: Is there any reason based on sound federal policy to deny a right of action to the owner of goods that have been lost or damaged while in the custody of the Customs Service?

There is, we submit, no policy justification for barring a lawsuit of this kind. In such a case, private property taken by government officials without the consent of the owner has been damaged or has disappeared. It is obviously unjust to expect the owner of the property, who did not willingly deposit his merchandise with the United States and who had no control or custody over the goods when they were damaged or taken, to bear the loss. As the United States has agreed to be liable for contract obligations expressly or impliedly assumed by its agents in the execution of their duties as well as for negligent acts performed while they are carrying out their official functions, the United

either tort or contract theories. Hence it was reasonable to assume that Congress did not intend to permit this kind of claim when it waived sovereign immunity for either contract or tort actions. By contrast, the United States has often been held liable as a bailee, *e.g., Agnew v. Haymes,* 141 F.631 (4th Cir. 1905), and liability on that ground for the acts of government employees was, in all likelihood, in the contemplation of the Congresses that enacted the laws.

States should compensate the private citizen, in the same manner as a private bailee would do, if the citizen's goods are harmed or lost while they are in the United States' custody.

Had a private party offering services to the public – such as a warehouseman or wharfinger – lost goods similarly in his custody, he would have been held liable, simply on the basis of his possession of the property and his duty to return the property. 8 Am. Jur. 2d *Bailments* §§45, 50. All the more reason exists to find a bailment where, as here, the goods were taken against the will of the owner, and where, as here, the bailor had no choice among bailees.

The Court of Claims suggested that permitting lawsuits in these circumstances could interfere with "the vital importance to the public of unimpeded, lawful operations by customs officers. . ." (App., p.31a). In fact, since an action could be successfully maintained only if detained goods have been lost or damaged, it is hard to see how the usual "lawful operations" of the Customs Service could be impeded by permitting such claims. Only in the unusual situation in which property is missing or is physically harmed could the owner sue the United States. The mere act of "detention" could not be the basis for a lawsuit.

Indeed, as is often true of tort remedies, the prospect of civil liability would have a beneficial deterrent effect. It would encourage the Customs Service and its officials to devise methods for guarding and storing private property that would satisfy standards of reasonable care. If the government were immune from civil liability for damage or loss, there would be little or no incentive for government officials to maintain seized goods in proper storage facilities. Nor, so long as the risk of loss remains entirely with the private owner, would the government have any

incentive to impose stringent safeguards against theft or carelessness by its employees. Permitting lawsuits of this kind, on the other hand, highlights circumstances which have given rise to damage or loss and thereby encourages greater care in the future.

Conversely, the private owner would be left virtually remediless if liability were foreclosed. Unlike the situation in the case of postal matters, insurance for damage or loss after a Customs seizure is not routinely available in ordinary commercial transactions. Indeed, the standard form "Marine Open Cargo" insurance policy *excludes* from liability losses due to "seizure arrest, retraint, detainment, confiscation . . . *and the consequences thereof* . . . whether lawful or otherwise." Marine Open Cargo Policy, American Institute of Marine Underwriters, para. 17a. (emphasis added). Thus, unlike the postal situation, the risk of harm or loss attributable to negligence or theft by government employees cannot routinely be shifted to an insurer.

Equity and sound management of the federal establishment warrant placing the cost of damage or loss incurred while goods are in federal custody on the United States and not on the owner of private property. No legitimate government function would be impeded and no proper government interest would suffer.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be reversed.

Respectfully submitted,

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APPENDIX A

28 U.S.C. §2680

The provisions of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U.S.C., title 46, sec. 781-790, inclusive), or the Act of March 3, 1925 (U.S.C. title 46, secs. 781 – 790, inclusive), relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the government in administering the provisions of the Trading with the Enemy Act, as amended.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing

through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

No. 78-1175

In the Supreme Court of the United States

OCTOBER TERM, 1979

HATZLACHH SUPPLY COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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INDEX

Argument—Continued

CITATIONS

Cases:

Cases—Continued

Cases—Continued Page

Cases—Continued Page

Statutes and rules:

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (A. 25a-32a) is reported at 579 F.2d 617.

JURISDICTION

The judgment of the Court of Claims was entered on July 14, 1978, and a timely petition for rehearing was denied on September 29, 1978 (Pet. App. 9a). On December 8, 1978, the Chief Justice extended the

time for filing a petition for a writ of certiorari to January 27, 1979 (Pet. App. 10a). The petition was filed on January 26, 1979, and was granted on May 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the United States may be held liable for breach of an implied bailment contract when goods are lost while held by the United States Customs Service following their seizure for customs violations.

STATUTORY PROVISIONS INVOLVED

1. The Tucker Act, 28 U.S.C. 1491 provides in relevant part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

2. The Federal Tort Claims Act, 28 U.S.C. 2680, provides in relevant part:

> The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> * * * * *
>
> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by an officer of customs or excise or any other law-enforcement officer.

3. Prior to October 3, 1978, 19 U.S.C. (1976 ed.) 1592 provided in relevant part: [1]

> If any consignor, seller, owner, importer, consignee, agent, or other person or persons enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or makes any false statement in any declaration under the

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[1] 19 U.S.C. 1592 was amended on October 3, 1978, by Section 110(a) of the Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, 92 Stat. 888, 893-896. The amended statute provides in part (to be codified at 19 U.S.C. 1592(c)(5)) that:

> If the Secretary has reasonable cause to believe that a person has violated [customs entry requirements as set forth in] subsection (a) and that such person is insolvent or beyond the jurisdiction of the United States or that seizure is otherwise essential to protect the revenue of the United States or to prevent the introduction of prohibited or restricted merchandise into the customs territory of the United States, then such merchandise may be seized and, upon assessment of a monetary penalty, forfeited unless the monetary penalty is paid within the time specified by law.

92 Stat. 896. This amendment was enacted eight years after the declaration of forfeiture in this case and is not directly relevant to this litigation. All citations to the customs laws of the United States in this brief are to the laws as they existed in 1970, at the time of the seizure that occurred in this case.

provisions of section 1485 of this title (relating to declaration on entry) without reasonable cause to believe the truth of such statement, * * * whether or not the United States shall or may be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement; * * * such merchandise, or the value thereof, to be recovered from such person or persons, shall be subject to forfeiture, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates.

4. 19 U.S.C. 1618 provides in relevant part:

Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or

mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto. * * *

STATEMENT

Petitioner imported certain camera supplies and other miscellaneous items from Germany in April and May of 1970. This merchandise, which had been transported in shipping containers, was seized by the United States Customs Service on its arrival at the port in New Jersey. This action was taken because, upon opening the containers, customs officials discovered discrepancies between the descriptions of the merchandise submitted on arrival and the items in fact landed (A. 26a). The Customs Service gave petitioner formal, written notice that the seized goods were declared forfeited to the United States under 19 U.S.C. 1592.

On June 5, 1970, and June 26, 1970, petitioner applied to the Secretary of Treasury under 19 U.S.C. 1618 for remission of the forfeitures and return of the seized goods (A. 10a, 18a). In these petitions, petitioner offered explanations for the violations of 19 U.S.C. 1592, stating that, while the description of the goods on the customs documents was erroneous, petitioner "in no way contributed, either actively or passively, in the erroneous description, and that his only instruction to [his broker agent] was to prepare a proper [entry] application" (A.

11a; see A. 20a-21a).[2] Petitioner also complained that the government's inventories indicated that a portion of the merchandise had disappeared since the goods were landed (A. 15a-16a, 21a-22a).[3]

On October 13, 1970, the Secretary agreed to remit the forfeiture in return for payment of a $40,000 penalty (A. 3a). Petitioner paid the penalty, and the Customs Service thereupon returned the forfeited materials in its possession (*ibid.*; see A. 26a).

On March 17, 1976, six years after the first container was landed (A. 2a), petitioner filed this suit in the United States Court of Claims seeking to recover $165,220.50, which it alleged to be the value of the goods that were "lost or stolen" while in the custody of the Customs Service (A. 3a).[4] The government moved for summary judgment, alleging that

[2] Petitioner maintained that the misstatements of its agents did not justify forfeiture under 19 U.S.C. 1592 (A. 12a, 20a-21a).

[3] In the June 5, 1970, petition for remission of the forfeiture, petitioner claimed that "the statement of appraisement released to the petitioner's attorneys indicates that the quantities which survived the opening of the container in a public place accessible to strangers on the pier were smaller than the quantities stated on the invoices" (A. 15a). In the June 26, 1970, petition, petitioner asserted that "the importer has sustained an irreparable loss. For the inventory furnished by the Government, even taking several apparent errors into account, shows that a substantial shortage of goods took place after the containers were unsealed on the pier and while in Customs custody" (A. 21a-22a).

[4] Petitioner also sought to recover $2,000,000 for loss of "face and good will" (A. 4a). This claim was denied and is not in issue here.

the complaint failed to state a claim within the court's jurisdiction (A. 26a).[5] The Court of Claims granted the motion, holding that petitioner had not stated a claim for breach of an implied bailment contract and therefore had failed to state a claim on which the court could grant relief (A. 32a).

The court first rejected petitioner's contention that the seizure of the merchandise by the Customs Service was " 'capricious, arbitrary, unreasonable, unlawful and not sanctioned nor colored' by law" (A. 26a). The court noted that petitioner's application for remission of the forfeiture "to the Regional Commission of Customs *admitted* that the merchandise description submitted to the [Customs Service] was 'erroneous' and that the discrepancy between the merchandise description and the items actually landed [was] 'obvious and apparent' " (A. 26a; emphasis in original). The court observed that, while the sanction of forfeiture in this context might appear severe, the Customs Service had not acted unlawfully, arbitrarily or capriciously in declaring the forfeiture and seizing the merchandise under 19 U.S.C. 1592 (A. 26a). The court also observed that, even if the seizure of the goods had been unlawful, arbitrary or capricious, the Court of Claims would have had no jurisdiction over petitioner's action because it "would then sound in tort" (A. 26a-27a, citing *Algonac*

[5] The government also impleaded Sea-Land Services as third-party defendant. Sea-Land operated the terminal where the goods were first landed and where they were detained before their removal to a government warehouse.

Mfg. Co. v. *United States*, 428 F.2d 1241 (Ct. Cl. 1976)).[6]

The court then rejected petitioner's claim that the government had entered into an implied contract of bailment to return the merchandise seized for forfeiture under 19 U.S.C. 1592. The court concluded that, when the government seizes merchandise for forfeiture for violations of Section 1592, it does not

> *assent*[] to, or agree[] to be bound by, an implied-in-fact contract to return the merchandise whole. Lacking such assent by one of the parties (and here it is doubtful whether either of the parties actually agreed), we cannot find an implied-in-fact contract. *See, e.g., Somali Development Bank* v. *United States*, 508 F.2d 817, 205 Ct. Cl. 741 (1974).

(A. 32a; emphasis in original).

The court noted that the Second Circuit had concluded in *Alliance Assurance Co.* v. *United States*, 252 F.2d 529 (1958), that an implied-in-fact contract of bailment was created when the government detained merchandise for inspection to determine compliance with entry requirements. It distinguished the decision in *Alliance*, however, on two principal grounds. First, there is "the obvious factual distinction" that this case involves seizure for forfeiture rather than inspection, and the importer in this case

[6] For essentially the same reasons, the court rejected petitioner's claim that the forfeiture of merchandise entered in violation of 19 U.S.C. 1592 constitutes a " 'taking' * * * without just compensation" (A. 27a). Petitioner has not sought further review of these rulings of the Court of Claims.

was thus not the "unquestioned, rightful owner" of the goods as the court had assumed in *Alliance* (A. 30a).[7] Second, where goods are seized for forfeiture under 19 U.S.C. 1592, any tort claim against the United States "arising in respect of * * * the detention" is expressly precluded by 28 U.S.C. 2680(c). Because Congress has "*specifically precluded recovery* in claims arising from customs detention, even where such claims arose from tortious actions by the Government" (A. 31a-32a; emphasis in original), the court reasoned that it could not find an implied agreement by the government to pay for the value of the allegedly missing merchandise (*ibid.*).[8] The court indicated, however, that it would not consider its decision "as necessarily controlling a case in which there were additional facts from which an implied or express agreement could possibly arise, *e.g.*, a

[7] In *Alliance*, the court of appeals had relied on the fact that the importer was "the lawful owner" of the merchandise held by the government for customs inspection. 252 F.2d at 532. The court emphasized that the goods there at issue had passed customs inspection before they were lost. *Id.* at 531. The court also remarked that there was an "elaborate set of ten tickets, at least two of which [were] designed to restore the goods to the owner," which supported an inference of a promise to return the goods following inspection. *Id.* at 532.

[8] The court noted that the Second Circuit had ruled in *Alliance* that merchandise lost while in the possession of the government for customs inspection is not being "detained" by the government and that neither tort nor contract liability is thus precluded by 28 U.S.C. 2680(c) for such claims. The court suggested that the *Alliance* court might interpret 28 U.S.C. 2680(c) to preclude recovery on the different facts of this case (A. 31a).

promise, representation or statement that the goods would be guarded or carefully handled" (A. 32a). In the latter circumstances, the court stated that a claim might lie under the Tucker Act even though 28 U.S.C. 2680(c) barred recovery under the Federal Tort Claims Act (*ibid.*).

SUMMARY OF ARGUMENT

The Court of Claims is a court of limited jurisdiction. A claim based upon an implied contract is within the jurisdiction of the Court of Claims only if the contract is one implied-in-fact, not implied-in-law. For petitioner to prevail in this case, it must establish that the United States and petitioner mutually assented in fact to a contract of bailment for merchandise seized by the United States for forfeiture under the customs laws.

A. The elements of an implied-in-fact contractual bailment are wholly lacking in this case. In a contractual bailment, the bailor retains unquestioned title to the property and the right to call for delivery or reclaim his goods. The United States, however, seized petitioner's merchandise by operation of law under a claim of government ownership due to forfeiture for violation of the customs laws, and not by mutual assent. The United States held the merchandise under its own claim of title and not pursuant to any contractual agreement with petitioner.

B. The fact that the United States does not enter into an implied-in-fact contract of bailment when it seizes goods for forfeiture does not mean that the

government has no responsibility under any circumstances to return or safeguard goods seized for violations of the customs laws. At common law, customs officials are regarded as "quasi-bailees" (*Story on Bailments* § 613, at 597 (7th ed. 1863)) because the law imposes on them certain responsibilities that are analogous to those created by a contractual bailment. In particular, customs officers must exercise reasonable diligence in the care of goods seized and held by them in the performance of their official duties. This responsibility is imposed by law, however, and not by agreement; it is enforcable in a private tort action and not in a suit for breach of contract.

The statutes of the United States have long recognized the tort liability of customs officers as a result of their "quasi-bailee" status. 28 U.S.C. 2006 provides that, in an action brought against a customs officer for negligent loss of goods, if it is established that the seizure was made with probable cause the judgment may not be executed against the individual officer but "shall be paid out of the proper appropriation by the Treasury." Under this statute, the liability of customs officers remains grounded in tort, not in contract. The statute merely protects customs officers in limited circumstances from being held personally liable for their tortious conduct. *States Marine Lines, Inc.* v. *Shultz*, 498 F.2d 1146, 1149 (4th Cir. 1974).

The Court of Claims plainly lacks jurisdiction over personal actions against government officers; it also

lacks original jurisdiction over claims grounded in tort. The implied-in-law or "quasi-bailee" responsibilities of customs officers are thus not the proper subject of suit in the Court of Claims. While there is a remedy for goods that are seized but not forfeited and are lost by the negligence of customs officers, that remedy is not in the Court of Claims.

C. This conclusion is supported by the fact that in enacting the Federal Tort Claims Act, Congress was careful not to shoulder for the United States the potential tort liability of customs officers. 28 U.S.C. 2680(c) excludes from the general coverage of the Act any claim arising "in respect of the * * * detention of any goods or merchandise by any officer of customs * * *." Claims for negligent loss of goods during customs detention must be brought against the customs officer as an individual; they are excluded from coverage under the Federal Tort Claims Act. As the Court of Claims concluded in this case, the United States cannot be assumed to have assented in fact to a liability that it has by law disclaimed.

ARGUMENT

THE COURT OF CLAIMS LACKS JURISDICTION TO AWARD DAMAGES ON PETITIONER'S CLAIM BECAUSE AN IMPLIED-IN-FACT CONTRACT OF BAILMENT DOES NOT ARISE FROM THE SEIZURE OF GOODS FOR FORFEITURE UNDER 19 U.S.C. 1592

A. A Claim Founded Upon An Implied Contract With The United States Is Not Within The Jurisdiction Of The Court Of Claims Unless There Was Mutual Assent To Enter Into The Contract

The Court of Claims is a court of limited jurisdiction. Under the Tucker Act, it has jurisdiction to award damages upon any claim against the United States that is

> founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. 1491. The limitations in this grant of jurisdiction are strictly observed. *Soriano* v. *United States*, 352 U.S. 270, 273 (1957); *Kendall* v. *United States*, 107 U.S. 123, 125 (1882). As this Court stated in *United States* v. *Testan*, 424 U.S. 392, 399 (1976), quoting *United States* v. *Sherwood*, 312 U.S. 584, 587-588 (1941), "[e]xcept as Congress has consented [to a cause of action against the United States], there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States."

In this case, petitioner argues that the United States entered into, and subsequently breached, an implied contract of bailment for merchandise seized by the United States for violations of customs entry requirements under 19 U.S.C. 1592. But a claim based upon an implied contract is within the jurisdiction of the Court of Claims only if the contract is "one implied in fact and not one based merely on equitable considerations and implied in law." *United States* v. *Minnesota Mutual Investment Co.*, 271 U.S. 212, 217 (1926). See *Cities Service Gas Co.* v. *United States*, 500 F.2d 448 (Ct. Cl. 1974).

A contract "implied in law" (or quasi-contract) arises "where, by fiction of law, a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress * * *." *Baltimore & Ohio R.R.* v. *United States*, 261 U.S. 592, 597 (1923). The duty "is imposed by operation of law without regard to the intent of the parties. Such arrangements are treated as contracts for the purposes of remedy only." *Russell Corp.* v. *United States*, 537 F.2d 474, 482 (Ct. Cl. 1976), cert. denied, 429 U.S. 1073 (1977). See *Algonac Mfg. Co.* v. *United States*, 428 F.2d 1241 (Ct. Cl. 1970).

By contrast, a contract implied-in-fact is a true contract, "founded upon a meeting of [the] minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Baltimore & Ohio R.R.* v. *United States*, *supra*, 261 U.S. at 597. An

implied-in-fact contract differs from an express contract only in that the agreement is not expressed in words, either written or spoken, but is instead "indicated by some intelligible conduct, act or sign." *Id.* at 598. In all other respects, all the elements of an express contract must be shown:

> For there to be an express contract, the parties must have intended to be bound and must have expressed their intention in a manner capable of understanding. * * *
>
> * * * * *
>
> A contract implied in fact requires a showing of the same mutual intent to contract as that required for an express contract. The fact that an instrument was not executed is not essential to consummation of the agreement. It is essential, however, that the acceptance of the offer be manifested by conduct that indicates assent to the proposed bargain.

Russell Corp. v. *United States*, *supra*, 537 F.2d at 481-482. Accord, *Tree Farm Development Corp.* v. *United States*, 585 F.2d 493 (Ct. Cl. 1978).

For petitioner to prevail on its claim, it must therefore establish that the United States and petitioner mutually assented to a contract of bailment for merchandise seized by the United States for forfeiture under the customs laws.[9]

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[9] "The general rule that the assent of both parties is necessary before a contract, either express or implied in fact, can come into existence, is applicable to the ordinary case of a contract of bailment." *H. S. Crocker Co.* v. *McFaddin*, 148 Cal. App. 2d 639, 644, 307 P.2d 429, 432-433 (1957). See also pages 22-23, *infra*.

B. Neither The United States Nor Petitioner Manifested Its Assent To A Contract Of Bailment For The Goods Seized For Forfeiture Under 19 U.S.C. 1592

The Court of Claims correctly concluded (A. 32a) that the United States and petitioner did not mutually assent to a contract of bailment for merchandise seized by the United States under 19 U.S.C. 1952 for violations of the customs laws.

1. *The Seizure Of Goods For Violations Of The Customs Laws Does Not Create An Implied-In-Fact Contract Of Bailment*

A contractual bailment cannot be implied in fact "where it appears it was the intention of the parties, as derived from their relationship to each other and from the circumstances of the case, that the property was to be held by the party in possession in some capacity other than as bailee." *H. S. Crocker Co.* v. *McFaddin*, 148 Cal. App. 2d 639, 644, 307 P.2d 429, 433 (1957). When the United States seized petitioner's goods for forfeiture for violations of the customs laws, it did not assent to the elements of a contractual bailment.

A contractual bailment "is premised upon the uninterrupted retention of title in the * * * bailor." *In re American Merchandising Co.*, 136 F. Supp. 952, 954 (D.N.J. 1955); 8 C.J.S. *Bailments* § 1, at 314 (1962).[10] It is created by the delivery of property by

[10] Constructive bailments, which are not contractual in nature but are implied-in-law duties imposed when there is "lawful possession, however created, and the duty to account for the thing as the property of another" (*Spencer* v. *First*

the owner to another for a specific purpose, with an "express or implied contract to redeliver the goods when the purpose has been fulfilled, or to otherwise deal with the goods according to the bailor's directions." *Maulding* v. *United States*, 257 F.2d 56, 60 (9th Cir. 1953). See 9 *Williston on Contracts* § 1030, at 876 (3d ed. 1967). In a contractual bailment, title does not change with delivery of the property, and the owner retains the right to call for delivery or reclaim his goods. *Department of Revenue* v. *Jennison-Wright Corp.*, 393 Ill. 401, 407, 66 N.E.2d 395, 398 (1946); *Haskins* v. *Dern*, 19 Utah 89, 98, 56 P. 953, 955 (1899); *Malz* v. *State*, 36 Tex. Crim. 447, 37 S.W. 748 (1896); 9 *Williston on Contracts*, *supra*, § 1035, at 890-891. While the property remains in the possession of the bailee, the bailee "may not dispute the title of his bailor." *Canadian Co-op. Wheat Producers, Ltd.* v. *Murphy & Hoffman, Inc.*, 52 F.2d 496, 497 (W.D.N.Y. 1931). Because of the trust nature of a contractual bailment, the bailee "cannot set up title in himself unless it has been acquired * * * from a transfer made by the bailor subsequent to the bailment." 9 *Williston on Contracts*, *supra*, § 1036, at 895. *Blackorby* v. *Friend, Crosby & Co.*, 134 Minn. 1, 3, 158 N.W. 708, 709 (1916):

> It is a well-settled rule in the law of bailments that the bailee must return the property or its proceeds to the possession of the bailor before he can assert a title thereto adverse to the bailor.

Carolinas Joint-Stock Land Bank, 165 S.E. 731, 732 (S.C. 1932)), are discussed at pages 22-23, *infra*.

If the bailee transfers or disclaims the title of the bailor, the "bailment terminates and the right to immediate possession is restored to the bailor." *Naamloze Vennootschap Suikerfabriek "Wono-Aseh"* v. *Chase National Bank*, 111 F. Supp. 833, 844 (S.D. N.Y. 1953). See also *Trotter* v. *Union Indemnity Co.*, 33 F.2d 363 (W.D. Wash.), aff'd, 35 F.2d 104 (9th Cir. 1929); *United States* v. *United Marketing Ass'n*, 220 F. Supp. 299, 306 (N.D. Iowa 1963).

These attributes of a contractual bailment relationship bear no resemblance to the situation in this case. When the United States seized petitioner's goods for customs violations under 19 U.S.C. 1952, it did not recognize petitioner as the "unquestioned, rightful owner" (A. 30a) of the goods and undertake to return them at petitioner's direction. The United States seized the merchandise by operation of law under a claim of government ownership due to forfeiture, and not by mutual assent. The United States claimed (and petitioner has not disputed) that the merchandise was brought into this country under a customs declaration that contained material false statements concerning the contents of the shipment (see page 7, *supra*). Because of these false statements, the goods were subject to forfeiture and properly seized by customs officers under 19 U.S.C. 1592. The United States then held the goods under a claim of ownership, not as bailee. Indeed, in view of petitioner's admission "that the merchandise description submitted to [Customs'] officials was 'erroneous' and that the discrepancy between the merchandise description and the items actually landed [was] 'obvious and

apparent'" (A. 26a), it would appear that the government's claim that the goods were forfeited was correct. See *One Lot Emerald Cut Stones and One Ring* v. *United States*, 409 U.S. 232, 234 (1972).[11]

> By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property * * * connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed * * *.

United States v. *Stowell*, 133 U.S. 1, 16-17 (1890).[12]

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[11] In *One Lot Emerald Cut Stones and One Ring, supra*, the Court noted that, in a proceeding to adjudicate goods forfeited for importation in violation of customs entry requirements, the government need not prove intent to defraud. 409 U.S. at 234. See also 19 U.S.C. 1592 (goods may be seized for forfeiture for "any false statement in any [customs entry] declaration * * * without reasonable cause to believe the truth of the statement, whether or not the United States shall or may be deprived of the lawful duties * * *.").

[12] The government's claim of title in this case, though valid, was not adjudicated in formal court proceedings and thus remained unperfected. *United States* v. *Stowell, supra*, 133 U.S. at 17. Adjudication became unnecessary because the Secretary exercised his discretion to remit the forfeiture pursuant to 19 U.S.C. 1618. (See pages 28, 31, *infra*.) During the period that the United States held the goods pursuant to 19 U.S.C. 1592, however, it did so under a claim of rightful ownership and not by the assent of the parties that the goods would be returned at petitioner's direction.

Because the United States seized petitioner's merchandise under a claim or rightful ownership, in derogation of petitioner's title and without assenting to return the merchandise at petitioner's direction, the elements of an implied-in-fact contract of bailment were wholly lacking.[13] The United States held the merchandise under its own claim of title, not pursuant to any contractual agreement with petitioner.[14]

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[13] The decision of the court of appeals in *Alliance Assurance Co.* v. *United States, supra,* is distinguishable on this basis (A. 30a; see note 7, *supra*). In *Alliance,* the court held that the government breached an implied contract of bailment when it failed to return goods that had been lost following their clearance through customs inspection. The court relied on the fact that the importer was "the lawful owner" of the merchandise and noted that the goods had passed customs inspection before they were lost. 252 F.2d at 531, 532. The court also noted that there was an "elaborate set of ten tickets, at least two of which [were] designed to restore the goods to the owner," which supported an inference of a promise to return cleared items following inspection. *Id.* at 532.

Here, by contrast, petitioner's goods did not pass customs inspection. The United States seized the goods for customs violations under claim of right and in derogation of petitioner's claim of title. Moreover, here, unlike in *Alliance,* there were no "additional facts from which an implied or express agreement could possibly arise, *e.g.*, a promise, representation, or statement" that the goods would be returned at petitioner's request (A. 32a). The Court need not decide in this case whether the decision in *Alliance,* on its different facts, was correct in finding an implied-in-fact contract. The Court of Claims properly refused to decide that hypothetical question (A. 30a, 32a).

[14] Petitioner cites (Br. 14-15) several cases in which courts have determined that, under the particular facts presented, the United States did assent to an implied-in-fact contract of bailment. These cases are inapposite, however, because we do not contend that the United States *cannot* assent to an implied-in-fact contract of bailment—as when it charters a barge (*C. F. Harms Co.* v. *Erie R.R.*, 167 F.2d 562 (2d Cir. 1948) or allows members of the public to use a Navy dock (*Gulf Transit Co.* v. *United States*, 43 Ct. Cl. 183 (1903)). Rather, it is our position that, on the totally different facts of this case, the United States *did not* assent to an implied-in-fact contract of bailment.

Petitioner's reliance (Br. 16 n.11) on *United States* v. *Dickinson*, 331 U.S. 745 (1947), and *United States* v. *Lynah*, 188 U.S. 445 (1903), is similarly misplaced. In those cases, the Court suggested, without concluding, that a taking of land for public use may create an implied promise to pay just compensation. The Court held that such a claim is, in any event, within the jurisdiction of the Court of Claims over claims "founded * * * upon the Constitution" (28 U.S.C. 1491) because the claim "traces back to the prohibition of the Fifth Amendment" * * *." 331 U.S. at 748. There is plainly no implied-in-fact promise of compensation when goods are seized for forfeiture for violations of the customs laws. The goods are not appropriated for public use; they are forfeited for unlawful conduct. *United States* v. *Stowell, supra.*

Finally, petitioner's reliance (Br. 15) on cases in which a statute creates a duty in an officer to pay certain sums to a claimant is unavailing. Where a statute "leave[s] no question" that a sum of money is to be paid, the claim is properly founded on the statute, not on an implied-in-fact contract to which the officer has not assented. See, *e.g., United States* v. *Hvoslef*, 237 U.S. 1, 10 (1915); *Medbury* v. *United States*, 173 U.S. 492, 497 (1899); *Mosca* v. *United States*, 417 F.2d 1382, 1385 (Ct. Cl. 1969). Petitioner has never claimed that it has a right in money damages against the United States based on statute. Moreover, there is no statutory duty to return goods that are forfeited to the United States.

2. *Neither 28 U.S.C. 2465 Nor A Discretionary Remission Of The Forfeiture Under 19 U.S.C. 1618 Creates An Implied-In-Fact Contract Of Bailment*

a. The fact that the United States did not enter into an implied-in-fact contract of bailment does not

mean that government officers have no responsibility under any circumstances to return goods seized for violations of the customs laws. It has been said that customs officials are "quasi bailees" (*Story on Bailments* § 613, at 597 (7th ed. 1863)) because the law imposes on them certain responsibilities that are analogous to those created by a contractual bailment. But these responsibilities are imposed by law, not by contractual agreement. There is no jurisdiction in the Court of Claims to award damages for the breach of these non-contractual responsibilities. *Merritt* v. *United States*, 267 U.S. 338, 341 (1925).

While many cases "refer to a bailment as a contractual relation, the statement is not entirely accurate. The relation may be created by operation of law." *Seaboard Sand & Gravel Corp.* v. *Moran Towing Corp.*, 154 F.2d 399, 402 (2d Cir. 1946) (footnote omitted). Courts have long recognized the distinction between contractual bailments, which "spring[] from the mutual assent of the parties" (*State* v. *Carr*, 118 N. J. L. 233, 234, 192 A. 36, 37 (1937)), and quasi-bailments or constructive bailments that arise by operation of law rather than agreement.

> While it is a relationship that ordinarily rests in contract, express or implied in fact, there is also a class of bailments, *quasi*-contractual in nature, which arises by operation of law "where, otherwise than by a mutual contract of bailment, one person has lawfully acquired the possession of personal property of another and holds it under circumstances whereby he ought, under principles of justice, to keep it safely and restore it or deliver it to the owner * * *; * * * such *quasi* contracts of bailment include what are known as constructive and involuntary bailments."

Ibid. Accord, *Seaboard Sand & Gravel Corp.* v. *Moran Towing Corp.*, *supra*, 154 F.2d at 402; *Wilson* v. *Citizens Central Bank*, 56 Ohio App. 478, 480, 11 N.E.2d 118, 119 (1936); *Spencer* v. *First Carolinas Joint-Stock Land Bank*, *supra*, 165 S.E. at 732; *Armstrong* v. *Sisti*, 242 N.Y. 440, 444, 152 N.E. 254, 256 (1926); 8 Am. Jur. 2d *Bailment* § 52 (1963).[15]

At common law, collectors of customs were regarded as "quasi-bailees" of merchandise seized for customs violations.[16] See *Story on Bailments*, *supra*, §§ 613, 618, at 597, 599. The responsibilities of the collector were imposed by law, not by agreement. If

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[15] In *Continental Insurance Co.* v. *Harrison County*, 153 F.2d 671 (5th Cir. 1946), Judge Walker noted that a constructive or quasi-bailment may be implied by law even when no mutual assent exists and that it ordinarily results from " 'lawful possession, however created, and [the] duty to account for the thing as the property of another.' " *Id.* at 676, *quoting Burns* v. *State*, 145 Wis. 373, 380, 128 N.W. 987, 990 (1911).

See also 8 C.J.S. *Bail* § 15, at 362 (1962) ("* * * an actual contract or one implied in fact is not always necessary to create a bailment. There is also a class of bailments which arise by operation of law.").

[16] Collectors, as agents of the government, are true bailees for the government of goods seized or held under a claim of government title. The government, being the owner, has the right to demand that the collector relinquish possession of the goods at the government's direction. *United States* v. *Thomas*, 82 U.S. (15 Wall.) 337 (1872), on which petitioner relies (Br. 8), established no more than this. In *Thomas* the Court held that the collector, "as custodian of the money [collected,] * * * is bailee of the government." *Id.* at 352. See also 19 U.S.C. 1605, which directs the collector to retain forfeited goods in his possession.

the goods were properly seized by the collector and forfeited to the government, there was of course no duty to return the goods to the claimant. If, however, the goods were determined not to be forfeited, the customs officers could be "liable in their individual capacities for tortious conduct committed in the performance of their duties." *States Marine Lines, Inc.* v. *Shultz*, 498 F.2d 1146, 1149 (4th Cir. 1974). The tort liability of the officers as constructive or quasi-bailees only "bears some analogy" (*Story on Bailments, supra*, § 613, at 597)[17] to the responsibilities that would be imposed if a contractual bailment had been created. If the seizure was "tortious, and without any reasonable cause" (*ibid.*), the customs officer could be sued in tort for conversion or trespass and would be strictly liable for goods lost while in his possession. *Id.* at 599. If, on the other hand, the seizure was justifiable (although eventually proven to be in error), the officer was liable only on a theory of negligence for breach of his "official obligation, as imposed by law" to exercise "reasonable diligence" in the performance of the duties of his office. *United States* v. *Thomas*, 82 U.S. (15 Wall.) 337, 342-343 (1872). The officer would then be liable in tort "only for losses and damages occasioned by the want of ordinary diligence." *Story on Bailments, supra*, § 613, at 597. See *Agnew* v. *Haymes*, 141 F. 631, 641 (4th Cir. 1905).

[17] See also 9 *Williston on Contracts, supra*, § 1038A, at 905: "While not directly presenting a question of contracts, there is a close analogy."

The legal duty imposed on the collector under the common law is plainly not created by agreement or mutual assent; the duty attaches even if the collector attempts to disclaim it at seizure. Failure to act with due diligence establishes a personal liability in tort; the duty is not assumed by contract or mutual assent. See *States Marine Lines, Inc.* v. *Shultz, supra*, 498 F.2d at 1149.[18]

The quasi-bailee status of the collector, which is implied by law "to supply the place of a special agreement where there is none" (*United States* v. *Thomas, supra*, 82 U.S. (15 Wall.) at 349)), has long been recognized in the statutes of the United States. Goods seized by customs officers for violations of entry requirements under 19 U.S.C. 1592 may be made the subject of forfeiture proceedings in the United States district courts. See 28 U.S.C. 2461. If the goods are adjudicated to be forfeited to the United States, the government's title is "perfected" (*United States* v. *Stowell, supra*, 133 U.S. at 17) and the claimant obviously has no further right or claim in the goods. If, however, judgment is entered for the claimant in

[18] The cases on which petitioner relies (Br. 8-10) establish only that the collector may be held personally liable in tort for negligence in the conduct of his office. See, *e.g.*, *Averill* v. *Smith*, 84 U.S. (17 Wall.) 82 (1872); *Burke* v. *Trevitt*, 4 F. Cas. (No. 2,163) 746 (C.C. Mass. 1816); *Agnew* v. *Haymes*, 141 F. 631 (4th Cir. 1905). See also *The Conqueror*, 166 U.S. 110 (1897); *Dioguardi* v. *Durning*, 139 F.2d 274 (2d Cir. 1944). By referring to the law of bailments as a source of a standard of due care, these decisions do not hold that the collector has in fact agreed or assented to a contractual bailment.

the forfeiture proceeding, 28 U.S.C. 2465 provides that the goods held subject to forfeiture "shall be returned forthwith to the claimant or his agent * * *." The customs officer must then return the goods, and if he fails to do so, the claimant may bring suit against the collector for personal liability in tort to recover his loss. *States Marine Lines, Inc.* v. *Shultz, supra,* 498 F.2d at 1148-1151.[19] In the action against the collector, if it is determined that the seizure was made without probable cause, the officer will be strictly liable for the loss of goods in his possession, and the United States will not indemnify the officer. *Agnew* v. *Haymes, supra,* 141 F. at 637-641.[20] If, however, there was probable cause for the seizure, the officer will be liable only in

[19] The United States has not consented to suits for money damages for the loss of goods that are not returned by the collector following an adjudication of non-forfeiture. The duty to return the goods resides in the collector, who may be sued individually and may be indemnified, in some circumstances, by the United States (see 28 U.S.C. 2006). *The Conqueror,* 166 U.S. 110 (1897); *States Marine Lines, Inc.* v. *Shultz, supra,* 498 F.2d at 1148-1151; *Agnew* v. *Haymes, supra,* 141 F. at 636-641. Congress has preserved the common law defenses that are available to the collector in the individual tort action. Indeed, as we discuss at pages 33-40, below, it was the adequacy of the common-law remedy against the collector that led Congress to enact 28 U.S.C. 2680(c) to exclude claims based on customs detentions from the general waiver of sovereign immunity for tort claims under the Federal Tort Claims Act.

[20] Indeed, if the seizure was without probable cause, the collector may be personally liable for consequential damages that otherwise are forbidden by 28 U.S.C. 2465. See *Agnew* v. *Haymes, supra,* 141 F. at 641.

negligence for the value of goods lost or damaged while in his possession; moreover, the judgment entered against the collector in such a case may not be executed against the collector, but "shall be paid out of the proper appropriation by the Treasury." 28 U.S.C. 2006.[21] See *States Marine Lines, Inc.* v. *Shultz, supra,* 498 F.2d at 1149-1150.

Under these statutes, the liability of the officer remains grounded in tort, not in contract. The statutes merely "protect[] * * * such officers" in some circumstances from their tort liability. *States Marine Lines, Inc.* v. *Shultz, supra,* 498 F.2d at 1149. The tort liability of the officer must be established, and the claim reduced to judgment, before the United States will act as surety for the collector's negligence. 28 U.S.C. 2006. And even then the United States has not consented to pay the judgment if the seizure was made without probable cause. *Ibid.* The Court of Claims plainly lacks jurisdiction over personal actions against government officers and individuals;

[21] 28 U.S.C. 2006 provides:

> Execution shall not issue against a collector or other revenue officer on a final judgment in any proceeding against him for any of his acts, or for the recovery of any money exacted by or paid to him and subsequently paid into the Treasury, in performing his official duties, if the court certifies that:
>
> (1) probable cause existed; or
>
> (2) the officer acted under the directions of the Secretary of the Treasury or other proper Government officer.
>
> When such certificate has been issued, the amount of the judgment shall be paid out of the proper appropriation by the Treasury.

it also lacks original jurisdiction over claims grounded in tort. The implied-in-law or "quasi-bailee" responsibilities of the collector are thus not the proper subject of suit in the Court of Claims.

Petitioner, in any event, has not sought to invoke the traditional tort remedy against the collector for negligent loss of goods. Whether such a remedy would have been available to petitioner had it been sought in the circumstances of this case is far from clear.[22] But, whatever the tort liability of the collector might have been as "quasi-bailee" of the goods seized for forfeiture, the defect with petitioner's action in the Court of Claims is that it seeks recovery against the United States on a bailment that is implied in law, not in fact.

b. Petitioner argues (Br. 12) that, when the Secretary of the Treasury exercised his discretion under 19 U.S.C. 1618 to remit the forfeiture upon petitioner's payment of a $40,000 penalty, the government thereby assented to an implied-in-fact contract of bailment for the merchandise that had been seized. But the discretionary action taken by the Secretary to remit the forfeiture was taken approxi-

[22] If, as we believe (see pages 18-19, *supra*), the goods were seized under a valid claim of forfeiture, petitioner would not be entitled to return of the goods in a proceeding to adjudicate the forfeiture. The Secretary of the Treasury could, however, remit the forfeiture "upon such terms and conditions as he deems reasonable and just." 19 U.S.C. 1618. Petitioner's right to the goods would then be no greater than that granted by the Secretary in remission of the forfeiture. See pages 28-31, *infra*.

mately six months after the goods had been seized for customs violations.[23] During the preceeding six month period, the merchandise had been held by the United States under a claim of right and not as an implied-in-fact bailee. The Secretary's action in remitting the forfeiture did not disclaim the government's prior declaration that the goods were forfeited. To the contrary, by remitting the forfeiture "upon such terms and conditions as he deems reasonable and just" (19 U.S.C. 1618), the Secretary reaffirmed that the goods were forfeited but concluded that a lesser sanction was appropriate due to the absence of "willful negligence," an intent "to defraud the revenue," or the presence of other "mitigating circumstances" (*ibid.*). This action did not retroactively create a contractual bailment at the time the goods were seized. See pages 16-18 *supra*.

Petitioner further contends that "the Customs Service explicitly agreed to return the goods upon payment of a $40,000 penalty" (Br. 12). But what the Secretary necessarily undertook was to return the goods *then in his possession*, not the additional merchandise that petitioner long previously had claimed was missing.[24] It is obvious that the Secretary could

[23] The forfeiture was remitted in October 1970. The goods were seized in April and May 1970. See pages 5-6, *supra*.

[24] Petitioner informed the Secretary in June 1970—two months after the seizure and four months before the Secretary remitted the forfeiture—that merchandise allegedly in the shipment was not reflected in the Customs Service inventory. See page 6, note 3, *supra*.

not implicitly have undertaken to return goods that had long been alleged to be missing and were not then in his possession. And petitioner has not alleged that the Secretary entered into an express contract to make petitioner whole for the claimed losses of over $165,000 (A. 24a) in return for petitioner's payment of the $40,000 penalty.[25] Obviously, the Secretary undertook to deliver something to petitioner in remitting the forfeiture. But, in the absence of any express agreement to the contrary, it cannot be implied that he undertook to perform a physical impossibility by returning goods petitioner repeatedly had asserted to be missing from the government's inventory (A. 15a-16a, 21a-22a).

Moreover, petitioner has never contended that the Secretary breached a contract to return the mer-

[25] Indeed, it is questionable whether the Secretary would have authority to enter into such a contract. 28 U.S.C. 2006 contemplates that the United States will not be liable for goods lost or damaged by customs collectors unless (i) the seizure was with probable cause but the goods are adjudicated not forfeited *and* (ii) the goods were lost through the tortious misconduct of the collector. See pages 25-27, *supra*. The Secretary's authority to remit a forfeiture upon such terms as he finds just and reasonable (19 U.S.C. 1618) would seem subjected to the express limitations on governmental liability for the collector's actions in 28 U.S.C. 2006.

But this issue is not presented here in any event. Respondent did not plead the existence of an express agreement to that effect or attach a copy of any such agreement to its petition in the Court of Claims. This is fatal to its present claim (Br. 12) that an express contract existed and imposed a duty on the Secretary to return goods that were not in his possession. See Rule 35(d) of the Rules of the Court of Claims; *Bateson-Stolte, Inc.* v. *United States*, 142 Ct. Cl. 304 (1958).

chandise the government held at the time that the forfeiture was remitted.[26] Instead, in the Court of Claims and in his statement of the question presented in this Court, petitioner has asserted that the United States breached "an implied-in-fact-contract of bailment" (Pet. Br. 12) that arose at the time that the goods were *seized* for customs violations. In any event, any claim raised here that the Secretary breached a contract to return goods in his possession at the time that the forfeiture was *remitted* would not be within the scope of the question on which certiorari was granted and should not be considered by this Court. Rule 23(1)(c) of the Rules of this Court; *Beck* v. *Washington*, 369 U.S. 541, 554 (1962). See also note 25, *supra*.

c. The question faced by this Court, whether petitioner's claims are based on an implied-in-fact contract or in tort, is a problem not often confronted in modern litigation. With the abandonment of the strict rules of common law pleading, such distinctions have lost most of their importance. See Fed. R. Civ. P. 2. When a suit is brought against the United States in the Court of Claims, however, these distinctions remain critical: the Court of Claims has jurisdiction over contract claims against the United States only if the "contract" arises from the mutual assent of

[26] Thus, petitioner has not contended that goods shown on the customs inventory were not returned when the forfeiture was remitted. See notes 3, 25, *supra*. Instead, petitioner argued in the Court of Claims (A. 34a) and reasserts here (Br. 12) that the remittance retroactively implied a bailment from the time of seizure. This contention is in error for the reasons previously discussed (pages 28-30, *supra*).

the parties, and it does not have jurisdiction over tort claims against either the United States or government officers.[27] While there is a remedy available for owners of goods that are seized but not forfeited and are lost while in the custody of customs officials, that remedy is not in the Court of Claims.[28]

3. *The Exception From Governmental Tort Liability in 28 U.S.C. 2680(c) For Claims Arising From The Detention Of Goods By Customs Officers Supports The Conclusion That An Implied-In-Fact Contract Of Bailment Does Not Arise From The Seizure Of Goods For Violations Of The Customs Laws*

a. As we have shown, the common law has long recognized a tort action against the collector for the

[27] In *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 395 (1939), the Court reiterated that a tort claim may not be the subject of relief in the Court of Claims. See also *Bigby* v. *United States*, 188 U.S. 400 (1903). There must be a *contractual* undertaking, either express (as in *Keifer & Keifer* and *Burtt* v. *United States*, 176 Ct. Cl. 310 (1966)) or implied-in-fact (as in *Somali Development Bank* v. *United States*, 508 F.2d 817 (1974)) to sustain the action in the Court of Claims.

28 U.S.C. 1504 gives the Court of Claims *appellate* jurisdiction over final judgments in the district courts in civil actions based on tort claims against the United States under 28 U.S.C. 1346(b), but only with the consent of all parties. See *Bird & Sons, Inc.* v. *United States*, 420 F.2d 1051, 1053 & n.3 (Ct. Cl. 1970). Petitioner sought to invoke the original jurisdiction of the Court of Claims, so Section 1504 is inapplicable here.

[28] Petitioner is plainly mistaken in contending that a contract should be implied else "there would be little or no incentive for government officials to maintain seized goods in proper storage facilities" (Br. 36). The collector's common law tort responsibility ensures that he acts under a duty of due diligence.

negligent loss of goods held in his possession.[29] In enacting the Federal Tort Claims Act to authorize claims against the United States for injury caused by "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant" (28 U.S.C. 1346(b); see 28 U.S.C. 2674), Congress did not choose to shift to the United States the potential tort liability of the collector. Instead, Congress determined to continue the arrangement developed at common law and under 28 U.S.C. 2006 and 2465, by which the United States will pay the judgment entered against the collector in a private tort action for negligence only when the seizure was supported by probable cause. See pages 25-27, *supra*. Because of the adequacy of the remedy afforded by the private tort action and 28 U.S.C. 2006, and because of Congress' unwillingness to assume any broader liability, 28 U.S.C. 2680(c) excludes from the general coverage of the Federal Tort Claims Act

> [a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer.

[29] The action may be brought by the claimant if the goods are determined to be his property. The action may be brought by the United States if the goods are forfeited to the United States. See *United States* v. *Thomas*, *supra*; note 15, *supra*.

Petitioner's claim of negligent loss of goods is one "arising in respect of the assessment or collection of any * * * customs duty, or the detention of * * * goods or merchandise by [an] officer of customs." It is therefore not within the limited waiver of sovereign immunity for tort claims against the United States in the Tort Claims Act. Assuming, for purposes of argument, that a tort claim may exist in the factual context of this case, it must be filed against the collector individually, not against the United States.[30] *States Marine Lines, Inc.* v. *Shultz, supra*, 498 F.2d at 1148-1151.

b. Petitioner argues, however, that the exception from direct government tort liability in 28 U.S.C. 2680(c) applies only to claims based on the fact of detention itself and that the statute does not exclude tort claims for the negligent loss of goods "after they have been detained" (Br. 18).[31] The language of

[30] Of course, even if we were wrong in this submission, petitioner could not prevail in this case. The Tort Claims Act confers no original jurisdiction on the Court of Claims. 28 U.S.C. 1346(b). Moreover, even if this case had arisen in a federal district court, petitioner could not succeed in any action under the Federal Tort Claims Act because the two-year statute of limitations on tort claims against the United States (28 U.S.C. 2401(b)) expired long before petitioner initiated this litigation. See page 6, *supra*.

[31] Petitioner's assertion is supported by *A-Mark, Inc.* v. *United States Secret Service*, 593 F.2d 849 (9th Cir. 1978), and *Alliance Assurance Co.* v. *United States, supra*. It has been rejected by several courts, including the Court of Claims in this case (A. 31a). See, *e.g.*, *United States* v. *One (1) 1972 Wood, 19 Ft. Custom Boat FL 8443AY*, 501 F.2d 1327 (5th Cir. 1974); *S. Schonfeld Co.* v. *SS Akra Tenaron*, 363 F. Supp. 1220 (D. S.C. 1973); *States Marine Lines, Inc.* v. *United States*, 359 F. Supp. 512 (D. S.C. 1973), rev'd on other grounds, 498 F.2d 1146 (4th Cir. 1974). The conflict is not, however, presented in this case for, as we have noted above (note 30, *supra*), the Court of Claims has no original jurisdiction over claims arising under the Federal Tort Claims Act.

the statute does not support such a distinction: it excludes "[a]ny claim arising in respect of * * * the detention of any goods or merchandise by any officer of customs * * *." 28 U.S.C. 2680(c). A claim alleging that goods were lost while being detained is literally a claim that "aris[es] in respect * * * of the detention." *Ibid.* Petitioner cannot maintain, on the one hand, that goods were lost while being detained by the Customs Service, and argue, on the other hand, that the goods were lost "after" the detention so as to be beyond the scope of 28 U.S.C. 2680(c).

The legislative history of the Federal Tort Claims Act refutes petitioner's effort "to fracture the clear language of [the] statute." *Andrus* v. *Sierra Club*, No. 78-625 (June 11, 1979), slip op. 8. Since its initial enactment, the Federal Tort Claims Act has included a series of exceptions from tort liability for various federal activities. The exception for claims arising in respect of the detention of goods by customs officers is one of the 13 exceptions now contained in 28 U.S.C. 2680(a)-(m). When these exceptions were first considered by Congress in 1940, Judge Alexander Holtzoff, who was then an officer of the Justice Department, testified before a congressional subcommittee that the exception for claims "arising in respect of the assessment or collection of any tax or customs

duty or the detention of any goods or merchandise by any officer of customs" should be enacted because various statutory remedies already existed and "[t]here was no purpose in interfering with that machinery." *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. on the Judiciary of the Senate Judiciary Committee*, 76th Cong., 3d Sess. 38 (1940). Two years later, the bill was again submitted to Congress, and the list of exceptions contained in 28 U.S.C. 2680 was supported by the Justice Department generally—without reference to particular exceptions—on the grounds that the exceptions either were necessary to protect certain government activities from the threat of suit or because other adequate remedies already were in existence.[32] *Tort*

[32] Petitioner, relying on *Alliance Assurance Co.* v. *United States, supra*, 252 F.2d at 534, argues (Br. 27) that the exclusion in 28 U.S.C. 2680(c) for Customs Service activities is narrower than the exception for Postal Service activities, which applies to claims of "loss, miscarriage, or negligent transmission" of mail. 28 U.S.C. 2680(b). To the contrary, the Postal Service exception in 28 U.S.C. 2680(b) applies to only a small subset of the broader activities excepted from tort liability for customs officers in 28 U.S.C. 2680(c). While the Postal Service exception applies only to claims arising from the loss or negligent transmission of mail, the Customs Service exception applies broadly to "[a]ny claim" whatsoever "arising in respect" to the detention of goods by customs officers. While the specific language of the Postal Service exception supports an inference that claims *not* based on loss or negligent transmission of mail are *not* excluded from Tort Claims Act coverage, the specificity of 28 U.S.C. 2680(b) provides no basis for limiting the broader exemption contained in 28 U.S.C. 2680(c).

Petitioner also cites (Br. 24-26) numerous law review articles that discuss the legislative history of the Federal Tort

Claims: Hearings on H.R. 5373 and H.R. 6463 Before the Comm. on the Judiciary of the House Comm., 77th Cong., 2d Sess. 28, 44 (1942). When the Federal Tort Claims Act was eventually enacted in 1946, Congress adopted the exceptions the Justice Department had proposed, explaining that the exceptions exclude from the coverage of the Act "claims which relate to certain governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available." S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946). See H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945).

Petitioner argues that this legislative history indicates that claims based on negligent loss of goods during customs detention were not contained within the exception in 28 U.S.C. 2680(c) because no "adequate remedies [were] already available" for such claims. But petitioner is simply mistaken in its premise that there were no pre-existing "statutory procedures for the recovery of damages for loss or damage to goods while in the custody of Customs officers" (Pet. Br. 23). As we have explained in detail (pages 25-27, *supra*), the claimant's traditional remedy—long recognized by the statutes of the United States—is to sue the collector individually in tort for the loss or damage and then to execute on the judgment by obtaining payment from the Treas-

Claims Act. These articles support our position that the exception contained in 28 U.S.C. 2680(c) was enacted because other adequate remedies existed for the loss of goods during customs detention.

ury. 28 U.S.C. 2006. See *States Marine Lines, Inc.* v. *Shultz, supra,* 498 F.2d at 1149. To be sure, the United States will not shoulder a judgment against the collector if the seizure was without probable cause; and, if the seizure was with probable cause, the collector (and, thereafter, the government) will be liable only for negligent loss of the goods and not for consequential damages.[33] 28 U.S.C. 2006. It was, no doubt, as Judge Holtzoff testified, the need to avoid interference with the traditional strictures of this adequate pre-existing remedy that led Congress to exclude from general governmental tort liability all claims arising from the detention of goods by the collector.[34] By enacting 28 U.S.C. 2680(c), Congress was careful not to assume a liability greater than that the United States had assumed under pre-existing legislation.

The legislative history of the Federal Tort Claims Act thus supports the conclusion that 28 U.S.C. 2680(c) is as broad as the words Congress employed. Claims for negligent loss of goods during customs de-

[33] See 28 U.S.C. 2465; *The Conqueror, supra,* 166 U.S. at 121-125; *Story on Bailments, supra,* at 598-599.

[34] If 28 U.S.C. 2680(c) means only what petitioner urges, the traditional limitations on the liability assumed by the United States under 28 U.S.C. 2006 would be rendered meaningless. As the court concluded in *States Marine Lines, Inc.* v. *Shultz, supra,* 498 F.2d at 1149, the exception from Federal Tort Claims Act liability in 28 U.S.C. 2680(c) "merely recognized the established procedure and the long-standing protections afforded by 28 U.S.C. §§ 2006 and 2465." 28 U.S.C. 2680(c) should not be read to "drain 28 U.S.C. §§ 2006 and 2465 of any purpose." 498 F.2d at 1150.

tention must be brought against the collector as an individual. They are excluded from coverage under the Federal Tort Claims Act.

c. Congress' careful efforts to preserve the traditional restrictions on the common law tort remedy against the Collector in enacting the Federal Tort Claims Act supports our submission that an implied-in-fact contract of bailment does not arise when goods are seized for forfeiture under 19 U.S.C. 1592. The exclusion in the Federal Tort Claims Act for claims arising in respect of customs detention is not an accidental result of drafting. Rather, it reflects a considered judgment by Congress that the sovereign immunity of the United States with respect to such claims should not be waived beyond the limited, adequate remedy available under the common law and 28 U.S.C. 2006. As the Court of Claims stated, allowing recovery against the United States on an implied-in-fact contract theory for breach of the "quasi-bailee" tort responsibility of the collector would " 'admit at the back door that which has been legislatively turned away at the front door' " (A. 31a, quoting *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666, 673 (1977)).[35] The United States cannot be assumed to have assented in fact to a lia-

[35] Petitioner mischaracterizes *Stencel* by arguing that it involved an attempt to "bypass the procedures" for relief provided by statute. In *Stencel,* the Court refused to infer a contractual undertaking by the government to indemnify a party for losses that the government had, by statute, otherwise limited or disclaimed. See 431 U.S. at 672-674. The Court's reasoning in *Stencel* applies here as well.

bility that it has in fact disclaimed by statute. See *Jackson* v. *United States*, 573 F.2d 1189 (Ct. Cl. 1978). The "quasi-bailee" status of the collector is a responsibility imposed by law, not a contract implied-in-fact. The Court of Claims therefore lacked jurisdiction in this case.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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HATZLACHH SUPPLY COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Solicitor General's brief in this case remits to secondary status the *ratio decidendi* of the Court of Claims—*i.e.*, that the Tort Claims Act, 28 U.S.C. §2680 (c), bars petitioner's claim. The major portion of the Solicitor General's brief is devoted to the argument that, on the facts of this case, there was no bailment "implied-in-fact" (as contrasted with one "implied-in-law"), so that the contract claim may not be asserted under the

jurisdictional limitations of the Tucker Act. This argument misreads the limitations of the Tucker Act, construes the facts of this case erroneously, and gives an overbroad interpretation to other related statutes on which the Solicitor General relies. In this Reply Brief we deal first with the government's present assertion that no "implied-in-fact" bailment was created and then turn to the issue decided by the court below—the meaning and application of 28 U.S.C. §2680(c).

1. The Solicitor General's first argument is that no bailment was created by the Customs Service's seizure of petitioner's goods because the seizure was not accompanied by any recognition of petitioner's title to the goods. The government argues that the Customs Bureau seized petitioner's goods "under a claim of rightful ownership, in derogation of petitioner's title" (Brief for the United States, p. 20), and thus no bailment relationship could have arisen.

This argument overlooks the realities of seizures of this kind by the Customs Service. Under established procedures formalized in the United States Code and in the Code of Federal Regulations, it was recognized by all parties to the transaction that the seizure of the goods did not formally and irrevocably make them the property of the United States. A meritorious petition for remission—establishing that there had been no willful negligence or intent to defraud—would, in the understanding of all, entitle petitioner to have the seized goods returned upon compliance with a condition such as payment of a penalty. See 29 U.S.C. §1618 and former 19 C.F.R. §§23.23-.25 (1970). Whether title remained formally with the petitioner or was transferred to the United States by the act of seizure was of no practical significance. The well-known practice—understood by all

parties to the transaction—recognized that the goods did not belong irrevocably to the United States to do with them as it wished.

Under the principles defining contracts "implied in fact" articulated by this Court in *Baltimore & Ohio R.R. v. United States,* 261 U.S. 592, 597-599 (1923), and the cases citing that decision, there was "a meeting of minds, which, although not embodied in an express contract, [was] inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." The "tacit understanding" emerging from the governing regulations and procedures was that the seized property was only provisionally in the United States' possession, and that its ultimate disposition depended upon whether a petition for remission or mitigation was filed and how it was acted upon. This conclusion is supported by the Court of Claims' own discussion, in *Hughes Transp., Inc. v. United States,* 121 F. Supp. 212, 222-227 (Ct. Cl. 1954), of the distinction between "implied-in-law" contracts. The Court of Claims there concluded that by excluding from the Tucker Act any "implied-in-law" and "implied-in-fact" contracts, Congress intended to deny recovery for "contracts implied from the unauthorized or tortious acts of the Government's agents" (121 F. Supp. at 225), or for instances where a private party *volunteers* goods or services to the United States (121 F. Supp. at 226), or where the government has clearly announced its intent "*not* to enter into the contract which the courts might have implied as between private parties" (*ibid.*). None of these exceptions applies here. Indeed, the Court of Claims agreed in its opinion that "a strong case" existed for the conclusion that there was "an implied-in-fact contract properly to preserve and redeliver all the goods" (App., p. 30a).

Laying to one side the formalistic question of "title,"[1] there was surely a "tacit understanding," in the present circumstances, that, as of April and May 1970, the United States was merely detaining petitioner's camera supplies until a final determination could be made with regard to them. Hence there was, in this regulatory framework, a bailment relationship "implied in fact."

2. The Solicitor General's second argument appears to be that 28 U.S.C. §2006—a statute enacted originally in 1863 (12 Stat. 741)—provides the exclusive remedy against the United States for the violation of a customs official's duty as a "quasi-bailee" (Brief for the United States, pp. 21-28). The government argues that a customs official is individually liable as a bailee under common-law principles and that this 116-year-old statute specifies the *only* circumstances under which damages of the kind involved here may be recovered against the federal treasury.

The Solicitor General's argument is unsound. Section 2006 of Title 28—which was Section 989 of the Revised Statutes—was designed, as its language plainly indicates, to relieve the personal property of federal officials from levies or attachments which might result from lawsuits brought as a consequence of official acts performed within the scope of their duty. The section declares only that "execution shall not issue" against a federal official, in his individual capacity, in certain enumerated circumstances. Section 2006 does *not* declare that "the United States shall not be liable" for

[1] As this Court observed in *United States v. Stowell*, 133 U.S. 1, 16-17 (1890), even the case of a valid forfeiture "title is not perfected until judicial condemnation . . . ."

certain specified harms. It is neither a statute authorizing actions against the United States in the described circumstances,[2] nor is it a statute barring lawsuits in situations other than those specified in the law.

The appellate decision cited repeatedly by the Solicitor General—*States Marine Lines, Inc. v. Schultz*, 498 F.2d 1146 (4th Cir. 1974)—supports our reading of this law, not the Solicitor General's. The *States Marine Lines* case concerned a lawsuit brought against federal officials for consequential damages growing out of a customs seizure—precisely the action for which 28 U.S.C. §2680(c) explicitly preserves sovereign immunity. The question in that case was whether the federal officials could be sued as individuals if, as the plaintiff acknowledged, suit against the United States was barred. The Fourth Circuit held that suit *could* be brought against the individuals, even if the ultimate consequence of a favorable judgment would be that the United States would be liable under 28 U.S.C. §2006.

The court of appeals ruled that the Tort Claims Act did not affect the established rule under which collectors of customs could be held individually liable for torts they committed. Thus, 28 U.S.C. §2680 and 28 U.S.C. §2006 were read as totally independent statutory provisions. The court did not suggest, as the Solicitor General appears to do here, that actions against the United States could be maintained *only* if liability is covered by 28 U.S.C. §2006.

3. The Solicitor General also takes refuge in a factual distinction which bears little relation to the petitioner's

[2] To be sure, an effect of the law's enactment was to permit actions to be maintained, as practical matter, against the United States after the requisite certificate of probable cause as filed. *See United States v. Sherman*, 98 U.S. 565 (1879).

theory of liability. The government argues that since the absence of the goods had been noted *before* the Customs Service sent petitioner a notification that the forfeiture would be remitted on payment of a $40,000 penalty, only the goods remaining in the possession of Customs at the time the notice was sent were subject to any bailment obligation. On this account the government maintains that the missing goods were never within any implied contract (Brief for the United States pp. 28-32).

We did not, however, argue that the United States assumed the legal duties of a bailee only *after* sending the notice proposing the payment of the penalty. We argued that the notice (which followed the procedure set forth in the regulations and anticipated by the parties) manifested the state of mind—the "tacit understanding"—with which the goods were initially seized. Thus, the date on which the notice was sent is immaterial; the important fact is that the United States indicated in that notice the capacity in which it had been holding petitioner's imported goods.

4. The Solicitor General's final argument deals with the issue which the Court of Claims held to be dispositive—*i.e.*, whether this lawsuit is barred by 28 U.S.C. §2680(c) (Brief for the United States, pp. 32-40). The Solicitor General apparently does not dispute our contention that an exception from the Tort Claims Act does not act as a limitation upon the Tucker Act (see Brief for Petitioner, pp. 30-34). Rather, the government asserts that the Tucker Act is inapplicable here *only* because there was no contract "implied in fact."

In any event, the Solicitor General's reading of the Tort Claims Act is erroneous. The language of the exception in subsection (c) is, as we have previously noted (Brief for Petitioner, pp. 18-19), markedly more restrictive than the language used in other exceptions. And the government's argument that in enacting subsection (c) Congress meant to preserve, as the exclusive remedy on these facts, the right to sue an individual collector of customs and to recover, in limited circumstances, from the United States under 28 U.S.C. §2006 defies common sense. The overriding purpose of the Tort Claims Act was to enable private citizens to sue the federal government directly for harm caused by federal employees. Neither Judge Holtzoff nor Congress could remotely have believed that a common-law right to sue an individual employee, blanketed within a Civil War provision designed to preserve the assets of such an employee from seizure or attachment, could be described as a situation "for which adequate remedies are already available." *See, e.g.*, H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945). And Section 2006 plainly does not fit within future-Judge Holtzoff's description of the "adequate remedies" being preserved. He described these remedies as "various tax laws providing the machinery for recovering any back tax that has been paid but was not properly owing." *Hearings on Tort Claims Against the United States (S. 2690) Before A Subcommittee of the Senate Judiciary Committee*, 76th Cong. 3d Sess. 38 (1940).

CONCLUSION

For the foregoing reasons, as well as those stated in our original brief, the judgment below should be reversed.

Respectfully submitted,

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